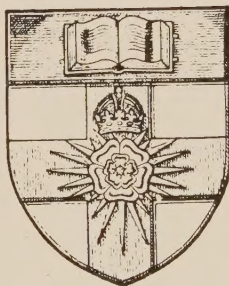


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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re WILLIAMS.
WILLIAMS *v.* BALL.

[1916 W. 783.]

C. A.
1916
ASTBURY J.
June 6.

Life Assurance—Policy—Assignment—No Consideration—Assignment conditional on Assignor predeceasing Assignee—Validity.

C. A.
Oct. 25.

The owner of a life policy gave it to his housekeeper with the following signed indorsement, namely: "I authorise"—naming her—"my housekeeper and no other person to draw this insurance in the event of my predeceasing her this being my sole desire and intention at time of taking this policy out and this is my signature." The assignor paid the premiums until his death:—

Held by Astbury J. and the Court of Appeal, that the assignment was inoperative; by Astbury J. on the ground that the assignment contained no present words of gift and being (a) without consideration and (b) conditional it did not pass the chose in action (a) under the Policies of Assurance Act, 1867, ss. 1, 5, schedule, or (b) under the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6; by the Court of Appeal on the ground that the assignment was an incomplete gift, being either (1.) a revocable mandate or authority which was revoked by the death of the assignor, or (2.), if taking effect on the death, a testamentary document not duly executed.

ADJOURNED SUMMONS.

On December 8, 1913, Henry James Williams (hereinafter called the assignor) insured his life with the Mutual Life Insurance

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Company of New York for 1000*l.*, and handed the policy to his housekeeper, Miss Ada Maud Ball (hereinafter called the assignee), saying "This is for you. Put it by." Some time afterwards the assignee looked through the policy and pointed out to the assignor that she could not receive the money, whereupon he replied: "Any one holding the policy can receive the money; but give it to me and I will indorse it and make it over to you." The assignor then indorsed the policy as follows: "I authorise Ada Maud Ball, my housekeeper, and no other person to draw this insurance in the event of my predeceasing her this being my sole desire and intention at time of taking this policy out and this is my signature." The assignor then signed his name over a penny stamp, dating the indorsement December 8, 1913. He then returned the policy to the assignee, who locked it up in her cash-box and retained possession of it until the assignor's death. No notice of this assignment was given to the insurance company. The assignor paid the premiums until his death.

The assignor died on February 16, 1916, having by his will, dated October 31, 1911, appointed the plaintiff his executor and made certain dispositions of his property.

On April 10, 1916, the plaintiff issued this originating summons to determine (*inter alia*) whether the policy was validly assigned, the assignee having consented to have the question determined by originating summons.

The summons was heard before Astbury J. on June 6, 1916.

Percy Wheeler, for the plaintiff. Previously to the Policies of Assurance Act, 1867, a policy of life assurance could only be assigned in equity, and an equitable assignment always required a consideration: *Glegg v. Bromley*. (1) Now s. 1 of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), merely provides that any person becoming entitled by assignment to a policy of life assurance "and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company" for the policy moneys shall be at liberty to sue in his own name to recover those moneys. This section presupposes a valid equitable assignment, which

(1) [1912] 3 K. B. 474, 491

involves a consideration, and merely enables the assignee to sue in his own name. Sect. 3 requires notice to be given to the assurance company, but I admit that this can be given at any time. Sect. 5 provides that the assignment may be made in the form in the schedule, namely: "I, A. B. . . . in consideration of . . . do hereby assign unto C. D. . . . the [within] policy of assurance . . ." Of course this form may be varied, but it implies two things, namely, first, that there must be consideration; secondly, that the policy must be assigned. In the present case there was clearly no consideration, and it is very doubtful whether the mere authority to draw the money in a certain event amounted to an assignment of the policy.

Owen Thompson, for the assignee. The Policies of Assurance Act, 1867, does not affect the rights of the assignor and assignee inter se: *Newman v. Newman*. (1) Now before that Act there could be a voluntary assignment of policies, although no notice was given to the insurance company: *In re King*. (2) The indorsement in the present case was a complete assignment and no consideration was necessary.

The assignment can also be supported under s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), which provides that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any legal chose in action of which express notice in writing shall have been given to the person from whom the assignor would have been entitled to receive the chose in action shall be effectual in law to transfer the legal right to the chose in action from the date of the notice and the remedies therefor and the power to give a discharge for the same without the assignor's concurrence. This section is clearly not confined to assignments for value, and notice can be given at any time.

[ASTBURY J. The assignment is not absolute. It is conditional on the assignor predeceasing the assignee.]

The word "absolute" is not opposed to "conditional." It is only opposed to an assignment "purporting to be by way of charge only." The only question is this: Does this assignment purport to be by way of charge only?—*Hughes v. Pump House Hotel*

. (1) (1885) 28 Ch. D. 674, 681.

(2) (1879) 14 Ch. D. 179.

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C. A. Co. (1) The fact that it is conditional is immaterial, and in any case the condition has been fulfilled.
 1916
 WILLIAMS, *H. A. Hind and Dighton Pollock*, for other parties.
In re. *Percy Wheeler* in reply. In *In re King* (2) the point that there
 WILLIAMS can be no valid equitable assignment without a consideration was
v. completely overlooked, and the case is no authority on that point.
 BALL. This assignment being voluntary cannot therefore be supported
 under the Policies of Assurance Act, 1867.

It is then sought to support it under s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873. But though a modern mortgage is an absolute assignment with a proviso for reconveyance and as such is an absolute assignment within the section, the present assignment is wholly conditional and is not within the section: *Durham Brothers v. Robertson*. (3) The assignment is invalid on both grounds.

ASTBURY J. (after stating the facts and reading the indorsement on the policy). The question is whether this indorsement constituted a valid assignment of the policy. On the whole I do not think it did. There were no present words of gift. The assignment was conditional on the assignor predeceasing the assignee, and no consideration was given or expressed to be given for the transaction. It was merely an equitable attempt to make an informal gift in the assignor's lifetime, and in any case being without consideration and conditional, it did not pass the chose in action either under the Policies of Assurance Act, 1867, or the Supreme Court of Judicature Act, 1873.

G. R. A.

C. A. The assignee appealed. The appeal was heard on October 25, 1916.

Owen Thompson, for the assignee. It is submitted that the decision of the learned judge in the Court below was wrong and that the indorsement of the policy constituted a perfectly valid assignment of the policy in favour of the assignee.

[SCRUTTON L.J. Is not the document one which must be executed

(1) [1902] 2 K. B. 190, 198.

(2) 14 Ch. D. 179.

(3) [1898] 1 Q. B. 765, 772, 773.

with all the formalities required in the case of a will?—*Governors and Guardians of the Foundling Hospital v. Crane*. (1)]

In that case it is clear that the gift was ambulatory. The intention of the donor was that the gift should have no operation until after his death.

[WARRINGTON L.J. Does not the indorsement amount to a direction to the insurance company to pay the policy moneys to the assignee only if she survived the assignor? If so, it clearly would be revocable.]

It is submitted that the document constitutes an irrevocable authority to the assignee to receive and give a good discharge for a chose in action, and that the assignor has done all in his power to make an effectual gift of the policy. It is an absolute gift of the policy moneys which the assignee is to receive in a particular event. If a donor has done everything he can to divest himself of the property in the chose in action and vest it in the donee the gift is good. The only difficulty in the assignee's way is that the document is an authority to receive money on the happening of a particular event. But for this the case would be like that of a gift of a banker's deposit receipt. When one comes into a Court the mere form of words used is immaterial. The Court has to find in the document an intention on the part of the assignor to divest himself of the property and vest it in the assignee.

[SCRUTTON L.J. referred to *William Brandt's Sons & Co. v. Dunlop Rubber Co.* (2) There was here no notice to the insurance company and no consideration.]

This was a complete gift.

[SCRUTTON L.J. Of the paper, no doubt, but surely not of the chose in action.]

Notice to the insurance company was not necessary to perfect the gift as between the assignor and the assignee: *Gorringe v. Irwell India Rubber and Gutta Percha Works*. (3)

No doubt if the assignee were claiming under an imperfect gift everything would depend on the form of the assignment. But she is claiming under as perfect a gift as the assignor could make. It is an absolute gift of moneys to be received in a particular event.

(1)²[1911] 2 K. B. 367.

(2) [1905] A. C. 454.

(3)²(1886) 34 Ch. D. 128.

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The assignor has given her the actual title deed and the absolute right to receive the moneys in the event of her surviving him. That that is an absolute assignment is shown by *In re King* (1) and *In re Griffin*. (2)

If it was a revocable authority the right to revoke it passed away on the death of the assignor.

[LORD COZENS-HARDY M.R. Your difficulty is that there is no complete assignment in the strict sense.]

A complete assignment is an assignment which gives the assignee a right to sue at law. In *In re Griffin* (2) it was held that the indorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operated as a good equitable assignment of the amount on deposit at the bank. That case is very near the present in its essential facts.

[SCRUTTON L.J. referred to *Fortescue v. Barnett*. (3) Could the assignor in this case have revoked the gift?]

If, as it is contended, it was a gift, it is submitted he could not. In the Court below it was argued that the assignment was not good under the Policies of Assurance Act, 1867, inasmuch as there was no consideration. The answer to that contention is that the Act does not affect the rights inter se of persons claiming the policy moneys.

Percy Wheeler, for the plaintiff, and *J. F. Carr* (for *H. A. Hind*, serving with His Majesty's Forces) and *Dighton Pollock*, for other parties, were not called upon to argue.

LORD COZENS-HARDY M.R. This is a rather curious case. Mr. Williams, the assignor, had a policy of insurance for 1000*l.* on his own life granted by the Mutual Life Insurance Company of New York. Soon after taking it out he handed it to his housekeeper, Miss A. M. Ball, and indorsed on the policy itself this memorandum: [The Master of the Rolls read the memorandum and continued.] What is that indorsement? Is it an absolute assignment of the policy? According to my construction it is not an assignment at all. The question whether in the circumstances there is a voluntary gift always involves the consideration not whether the donor might

(1) 14 Ch. D. 179.

(2) [1899] 1 Ch. 408.

(3) (1834) 3 My. & K. 36.

have given the property, but what is the form in which he has purported to give it. Take the case of shares in a limited company which are only transferable by deed, or the case of Consols which are only transferable at the Bank of England; it is quite clear that a mere letter not under seal in either of those cases purporting to assign the property would not amount to an assignment giving the benefit of the property to the donee. The transaction would not have been complete, the donor would not have done all he could to perfect it, and the intended gift would have failed. Of course if there had been valuable consideration for the assignment the position might have been different.

What then is the effect of the memorandum here? It seems to me to be of the nature of a mere power of attorney, though not under seal, authorizing the person named to receive the money. A power of attorney, however, becomes inoperative on the death of the person conferring it, and the recipient cannot claim to exercise the power after that person's death.

There is another answer. The document is not an assurance. It is a mere mandate which ceased to be operative at death; and further it seems to me to be, if anything, of the nature of a testamentary document. It is a document which was intended only to take effect in the event of the donor predeceasing the donee. I put the question to Mr. Owen Thompson whether there was anything which the assignee could have done with regard to the policy or policy moneys between the signature of the memorandum by the assignor and his death, and he admitted very frankly that he did not think there was. That being so, it seems to me to be extremely difficult to say that this document, which did not confer on the assignee any power or right during the assignor's lifetime, was an assignment of the policy or anything else than an attempt to give her an interest at his death in the event of his predeceasing her. If that be so, it seems to me that the assignee's claim cannot be supported on any ground.

I think, therefore, though not perhaps for precisely the same reasons as were given by the learned judge in the Court below, that his conclusion was right and that there was no gift of the policy to the assignee.

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WARRINGTON L.J. I agree. The assignee in the present case is a volunteer, and she claims to have received in the assignor's lifetime the gift of a certain chose in action, namely, a policy of insurance, the amount secured by which is in its nature only to be paid on the death of the assured. It is a policy on the assignor's own life. Claiming as she does as a volunteer and alleging that the assignor made this gift to her, she can only succeed if she can show that the assignor did everything which according to the nature of the property comprised in the assignment was necessary to be done in order to transfer the property and render the assignment binding upon him. I take these words from the judgment of Turner L.J. in *Milroy v. Lord* (1), adapting them to the circumstances of the present case.

Has the assignee here made out that the assignor has done everything that was necessary in order to transfer the property and render that assignment binding upon him? The question turns largely if not entirely on the construction of the document. Of course the mere form of words is immaterial if the assignor has used any form of words which expressed a final and settled intention to transfer the property to the assignee there and then. That would be sufficient. He need not use the word "give" or "assign" or any particular words. Has he done this? All he has done is to sign a document which is in these terms: [His Lordship read the indorsement and continued.] That in terms is a mere authority, and not only is this so, but it is an authority the effect of which would determine ipso facto if the assignee were to die in the lifetime of the assignor. It being a mere authority, and there being no consideration and nothing to show that it was intended to be irrevocable, I think we must read this as a revocable authority, a conclusion one would have arrived at apart from this as being the assignor's probable intention. I hold, therefore, that on its true construction the authority is a mere revocable authority. But the matter does not rest there. If this is a revocable authority to receive the policy moneys after the assignor's death it is a mere nullity because the authority would be revoked by the assignor's death.

On the whole I think the decision of Astbury J. was right, although, like the Master of the Rolls, I do not come to

(1) (1862) 4 D. F. & J. 264, 274.

this conclusion precisely for the reasons given by that learned judge.

SCRUTTON L.J. I agree.

Solicitors: *M. A. Orgill, for Llewellyn & Son, Tunstall; H. Clarkson & Son, for W. Huntbach, Hanley, Staffordshire.*

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In re KENNEDY.

CORBOULD *v.* KENNEDY.

[1916 K. 268.]

C. A.
1916
Oct. 26;
Nov. 3.

Will—Construction—Legacies, Annuities, and Bequests given “free of all death duties”—Trust for Sale and Conversion—Direction to pay “Death Duties,” Debts, Legacies, and Annuities out of Proceeds—Settlement of Residue—Gift of Life Interest therein—Legacy Duty thereon—Incidence.

A testator, after giving certain specific and pecuniary legacies and life annuities and making a specific devise, declared (clause 6) that “all the legacies annuities and bequests” bequeathed by his will should be given and paid free of all “death duties.” He gave his residuary estate on trust for sale and conversion and directed that his trustees should pay his funeral and testamentary expenses, “death duties,” debts, legacies, and annuities out of the proceeds and invest the residue thereof and hold the same upon trust to pay certain annual sums to A. and B. during the life of C., and subject thereto upon trust for C. for life, with remainder to A. and B. absolutely:—

Held, that C.’s life interest in the residue was a “bequest bequeathed by the will” within clause 6, and that the legacy duty payable in respect thereof was payable out of the corpus of the estate and not out of C.’s income.

Decision of Astbury J. [1916] 2 Ch. 379 reversed.

APPEAL from a decision of Astbury J. (1)

By his will, dated December 9, 1912, a testator provided as follows:—

By clause 1 he appointed the two plaintiffs executors and trustees

(1) [1916] 2 Ch. 379.

C. A. of his will and bequeathed 500*l.* to each of them accepting the
1916 office.

KENNEDY, By clause 2 he bequeathed certain "specific legacies."
In re. By clause 3 he bequeathed certain "pecuniary legacies."

CORBOULD By clause 4 he bequeathed certain life "annuities" and directed
v. his trustees to appropriate investments producing a sufficient income
KENNEDY. to answer them at the time of appropriation, with power to resort to
the capital whenever the income was insufficient. He authorized
his trustees as each annuity ceased to treat a corresponding part
of the appropriated fund as residue, retaining only such part as
would from time to time in their opinion be sufficient to produce
by its income an annual sum equal to the subsisting annuities.

By clause 5 he devised all his real estate in Lancashire to his
cousin Nigel absolutely.

By clause 6 he declared "that all the legacies annuities and
bequests bequeathed by this my will or by any codicil hereto
shall be given and paid free of all death duties."

By clause 7 he devised and bequeathed "all the real and per-
sonal estate not hereby or by any codicil hereto otherwise disposed
of" unto his trustees upon trust for sale and conversion with the
usual power of postponement, and directed that they should "out
of the money to arise from such sale and conversion and out of my
ready money pay my funeral and testamentary expenses death
duties and debts and the legacies and annuities hereby or by any
codicil hereto bequeathed," and should invest the residue of the
said money in the investments thereby authorized.

By clause 8 the trustees were directed to stand possessed of the
said investments therein called "my residuary estate" and of the
annual income thereof upon trust to pay during the joint lives of
the testator's sister Marion and his cousin Myles and during the
life of the survivor of them the "annual sum" of 500*l.* each to
the testator's cousins Nigel and Hugh, and subject to such respective
"annual sums" to pay the income to Marion for life without
power of anticipation (or in certain events to apply the same under
a discretionary trust giving her a protected life interest), and after
her death to pay the income to Myles for life, and after his death the
residuary estate and the income thereof were to be held in trust for
Nigel and Hugh absolutely in equal shares.

By a codicil dated May 22, 1913, the testator gave a further pecuniary legacy free of death duties, and also gave an annuity free of duty in lieu of a pecuniary legacy given by clause 3, but did not otherwise alter his will.

The testator died on June 12, 1914.

On May 3, 1916, the executors and trustees issued an originating summons to determine—

1. Whether, upon the true construction of the will, (a) the estate duty and (b) the succession duty payable in respect of the real estate in Lancashire devised to Nigel by clause 5 ought to be paid out of the proceeds of sale and conversion under clause 7 or ought to be borne by Nigel.

2. Whether all succession duty and legacy duty payable by reason of the testator's death in respect of the real and personal property passing under his will and codicil ought to be paid out of the capital of the proceeds of sale and conversion under clause 7, or whether the legacy and succession duty payable in respect of (a) the two annual sums of 500*l.* given to Nigel and Hugh by clause 8 and (b) the life interests given to Marion and Myles by clause 8 ought to be borne by them respectively.

3. Whether the two annual sums of 500*l.* given to Nigel and Hugh were to be paid free of all legacy duty, succession duty, and other duties (if any).

4. How the death duties payable by reason of the testator's death ought to be borne and paid.

It was admitted at the hearing of the summons that the specific devise of the Lancashire estate was duty free, and the arguments were confined to the duties on the annual sums given to Nigel and Hugh and the life interests of Marion and Myles.

Astbury J. held that the legacy duty payable in respect of the two annual sums of 500*l.* given to Nigel and Hugh and the life interests given to Marion and Myles must be borne by them respectively and not paid out of the capital of the settled residue.

Against this decision Marion alone appealed.

Maugham, K.C., and *Fairfax Luxmoore*, for the appellant. The gift to Marion of a life interest in the testator's residue is clearly a bequest by the will within clause 6, and is given free of legacy duty.

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The duty ought therefore to be paid out of corpus and not out of her income. It also falls within the direction, contained in clause 7, to pay all death duties out of the proceeds of conversion.

Romer, K.C., and *J. I. Stirling*, for the respondents. A gift of residue free from duty is meaningless and ineffective, for the duty must of necessity be paid out of the residue. The same applies to a gift of a life interest in residue. There is no residue until the duty is paid. Clause 6 does not apply to this bequest and Marion's life interest is not given free of duty. The legacy duty payable in respect of it must be borne by her : *In re Dalrymple*. (1)

C. P. Sanger, for the trustees.

Maugham, K.C., in reply.

Cur. adv. vult.

Nov. 3. LORD COZENS-HARDY M.R. This appeal raises one question only, namely, whether a sister of the testator, who is entitled to the income for life of the testator's residue which after her death is given to two cousins in equal shares, is liable to pay out of her income the legacy duty payable in respect of her life interest. Now under s. 12 of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), when, as is the case here, the persons interested in residue are not all chargeable at the same rate, legacy duty is not payable on the whole estate at once on the testator's death, but the beneficial interest of the tenant for life is treated as an annuity in respect of which payment of legacy duty is to be made by equal portions during the term of four years and all other legacy duty is payable only on the death of the tenant for life. The question really is whether these payments during four years ought to be paid out of what I may call the ultimate residue or whether they ought to be borne by the tenant for life.

Now the will, after giving legacies both specific and pecuniary and bequeathing certain life interests, in clause 6 declared "that all the legacies, annuities, and bequests bequeathed by this my will or by any codicil hereto shall be given and paid free of all death duties." By clause 7 the testator devised and bequeathed "all the real and personal estate not hereby or by any codicil hereto

otherwise disposed of" unto his trustees upon trust for sale and conversion with the usual power of postponement, and directed that they should "out of the money to arise from such sale and conversion and out of my ready money pay my funeral and testamentary expenses, death duties and debts, and the legacies and annuities hereby or by any codicil hereto bequeathed," and should invest the residue of the said money in the investments thereby authorized. By clause 8 the trustees were directed to stand possessed of the said investments, therein called "my residuary estate," and of the annual income thereof, upon trust to pay during the joint lives of the testator's sister Marion and his cousin Myles and during the life of the survivor of them the "annual sum" of 500*l.* each to the testator's cousins Nigel and Hugh, and subject to such respective "annual sums" to pay the income to Marion for life, and after her death to pay the income to Myles for life, and after his death the residuary estate and the income thereof were to be held in trust for Nigel and Hugh absolutely.

In these circumstances Marion claims that the legacy duty payable in respect of her life interest should be paid out of the capital of the estate and not out of her income. The learned judge has negatived this contention. In my opinion the decision was wrong. The life interest given by the will was a "bequest" within the meaning of clause 6, and I see no difficulty in giving effect to it. The executors and trustees have to provide the duty in either view, and the only question is as between the persons interested in the estate. It is no doubt true that in general a gift of residue or of a share of residue free from duty is ineffective, for the duty must be paid out of the residue. But it by no means follows from this that where the residue is settled and the duty is payable at different times and at different rates the duty in respect of the life interest cannot by the language of the will be made payable out of capital. It seems to me that the trustees in whom the whole estate is vested should pay the four instalments as they become due out of capital, diminishing thereby the ultimate residue to be divided. This will give effect to the directions in the will. I see no greater difficulty in doing this than if it were a gift out of residue to pay a legacy of £*x* free of duty at a time different from that fixed for the division of the ultimate residue.

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C. A. For these reasons I think the appeal should be allowed and a
1916 proper declaration made accordingly.

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WARRINGTON L.J. The question in this case is whether Marion Kennedy, to whom the income of the testator's residuary estate (after paying thereout two annuities of 500*l.* each) is payable, is, according to the true construction of his will, entitled to have the legacy duty payable in respect of her life interest discharged out of the capital of the estate. [The Lord Justice then stated the terms of the will and continued:] Marion Kennedy is a sister of the testator; Myles Kennedy (the second tenant for life of the residue) and Nigel Kennedy and Hugh Kennedy (the persons entitled to the corpus) are cousins. The legacy duty on their respective interests is at different rates, and accordingly the legacy duty on the income payable to Marion has to be assessed on the value of her life interest and paid in four annual instalments. In the absence of a direction to the contrary these would be paid out of her income. She says there is such a direction and contends that they ought to be paid out of corpus. The learned judge has rejected this view. Marion Kennedy appeals.

As to the annual sums payable to Nigel and Hugh, they are really in the same position as ordinary annuities, and but for the fact that the learned judge has taken a different view I should have thought it reasonably clear that they fall within clause 6 and should be paid free of duty. The annuitants, however, do not appeal, and as to them the order will stand.

The only question before us is as to Marion's income. Here again the direction to pay the income to her is in my opinion a bequest to her within the meaning of clause 6, and on the terms of that clause the income should be paid free of duty. The contention to which effect is given by the order under appeal is that inasmuch as the residue is the fund which has to bear the legacy duty on legacies given free of duty it cannot itself be so free, and that this inability applies to a partial interest therein, such as a life estate.

What is the effect in law of a gift of an interest in an estate free of legacy duty? It means simply that the duty is not deducted from the subject of the gift but is paid out of the general estate. It is in fact regarded as an additional legacy to the legatee. There

is no residue until that legacy, as well as legacies in the ordinary sense, has been paid. I see no difficulty in applying the direction in clause 6 to the life interest in question. The amount of the estate to the income of which Marion Kennedy is entitled without reference to the question as to duty can of course be ascertained, and must be ascertained before the amount of duty can be determined. When that has been done I see no reason why the sums which are from time to time payable in respect of the income should not, as other legacy duty, be raised and paid out of the estate, leaving Marion in a position to enjoy the income of what remains, which will be the true residue. This she will enjoy free of duty, because all the duty payable to the Crown will have been paid. The directions of the testator will thus be carried out as far as may be, and the only persons who will have to bear duty are those upon whom the testator has thrown the duty *prima facie* payable by other persons, and who cannot be freed from the duty on their own bequest because they can take nothing until all duty has been paid.

In my opinion, therefore, upon the true construction of clause 6, the duty on the life estate ought to be paid out of the corpus of the estate.

As to clause 7, I think the provisions of this clause as to payment of debts, legacies, and death duties do not affect the question one way or the other. They are merely administrative provisions telling the trustees to do what it would be their duty to do without such a provision. Moreover, such provisions as these cannot be complied with literally. There are many payments which in the nature of things cannot be made until after the investment of the proceeds of conversion has been carried out. It would, in my opinion, be wrong to give to the details of such provisions a determining effect on the beneficial interests conferred by the will.

On the whole I am of opinion that the appeal should be allowed and a declaration made as asked by the appellant.

SCRUTTON L.J. I should have been quite content to concur in the judgments which have been read, but, as we are differing from the learned judge below, I have thought it right to express my opinion in my own words.

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Marion Kennedy appeals from a decision of Astbury J. on an originating summons to ascertain the true construction of the will of her brother, Myles Burton Kennedy, by which decision the judge orders her to pay the legacy duty on the benefit she takes under the will. Myles Burton Kennedy's will, after providing for specific legacies in clause 2, pecuniary legacies in clause 3, and annuities in clause 4, devises and bequeaths in clause 7 the rest of his property to trustees to fulfil certain directions referred to below, and hold the residue in trust to pay—(clause 8)—(1.) the annual sum of 500*l.* each to Nigel and Hugh Kennedy during the joint lives of Marion and Myles Kennedy and the survivor of them ; (2.) the income of the residuary estate to Marion Kennedy for life or until determination of her interest by certain specified matters ; (3.) in this latter event the income to be paid to such of certain named beneficiaries as the trustees select ; (4.) on the death of Marion Kennedy to pay the income to Myles Kennedy for life ; (5.) on his death to hold the residuary estate and income in trust for Nigel and Hugh Kennedy absolutely in equal shares. Clause 6 provides : " I declare that all the legacies, annuities and bequests bequeathed by this my will or by any codicil hereto shall be given and paid free of all death duties." Astbury J. has held that the annual payments out of residue are not " annuities " under clause 6, the reason he gives being that they are ordered in clause 7 to be paid after paying annuities. He does not say why they are not " bequests " under clause 6. As the two annuitants of 500*l.* are also the ultimate recipients of the residue, they are not much interested which pocket they pay out of, and they do not appeal. The learned judge also holds, without giving any reasons, that the life interests of Marion and Myles are not " bequests " under clause 6. I am unable to concur in this view. " Bequests bequeathed by the will " appears to be an accurate description of the limited interests in the residue, whether of fixed or uncertain amount.

It was suggested that it could not apply because a bequest of " residue duty free " was meaningless, as the duty could only be paid out of what would otherwise be residue. This is true of the ultimate residue, but I do not understand its application to the earlier interests carved out of the residue. I do not understand why an annual payment of 500*l.* out of residue cannot be

bequeathed duty free; the duty will come out of the ultimate residue, and the obvious intention of the testator to give a clear 500*l.* per annum will be carried out. Mr. Romer, for the ultimate residuary beneficiaries, hardly disputed this as to the 500*l.*, but he said that different considerations applied to Marion Kennedy's life interest, though considerations not mentioned by the learned judge. He argued, as I understood him, that, as Marion was a sister and the ultimate beneficiaries cousins, the rates of death duty were different, and that the ultimate beneficiaries could not have the two sums deducted from their capital. I do not understand why this is impossible or undesirable; it seems to me to be what the testator intended when he directed that the bequests should be duty free—that is, that the ultimate beneficiary, and not the persons entitled to the limited interests, should pay them. It appears to be also what the testator directed when he ordered his executors and trustees to pay “my death duties” (by which I understand “the death duties on benefits conferred by my will”) before investing the residue, the income of which, after providing for the two annual payments, was to go to Marion Kennedy. It is true that this reduced Marion Kennedy's income by reducing the capital of which that income was the interest; but Mr. Maugham on her behalf did not object to this; he did object to her having to pay the death duties in four payments out of her income, and in this I think he was right.

I am of opinion that the answer of the learned judge to question 2 (*b*) should be set aside, and that the question should be answered by declaring that the legacy duty on the interest of Marion Kennedy as and when payable should be borne by the testator's estate. This is all we are asked to decide by the notice of appeal, and I propose to resist the temptation to give the executors and trustees general instructions in their duties on other points, legal or arithmetical.

Solicitors : *Corbould, Rigby & Co.*

G. A. S.

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In re BLAKE.

GAWTHORNE v. BLAKE.

[1916 B. 280.]

Conversion—Real Estate—Building Agreement—Lease—Option to Tenant to purchase Reversion—Notice to exercise Option—Death of Purchaser insolvent—Purchase never completed—Re-entry by Landlord.

At the date of a testator's death in 1897 certain premises, of which he was owner in fee, were the subject of a building agreement, under which leases were to be granted to M. This agreement contained a clause enabling M. to purchase the freehold reversion in the whole or any part of the premises affected by the agreement, if notice was given before a fixed date, and as from the date of such notice he was to be deemed the purchaser of the specified reversion. On September 28, 1899, M., having become entitled to leases of twenty houses, gave notice of his desire to purchase the freehold reversion of the houses. M. died insolvent on December 25, 1899, the day fixed for completion, and no steps were taken to enforce the contract. The trustees of the testator subsequently re-entered upon the whole property, including the twenty houses, in exercise of a power in the agreement enabling them so to do:—

Held, that the giving of the notice exercising the option was a conversion once for all of the realty into personalty, and the mere fact that the exercise of the option was not followed by completion of the purchase could not undo the conversion which had actually taken place, and therefore that the twenty houses must be treated as personalty of the testator as from September 28, 1899.

Held, further, that the re-entry of the testator's trustees did not work a reconversion into realty.

THE testator, Charles Blake, made his will dated August 2, 1893, and, after appointing executors and trustees, gave and devised all his real and personal estate to his trustees upon trust, during the life of his wife, to receive the rents and annual income and pay over one moiety of such net income to his wife for her life, and as to the other moiety, during the life of his wife, upon trust as therein mentioned, and after the death of his wife upon trust to sell and divide the residue of his personal estate equally between the children of his brothers and sisters, and after the death of his wife the testator gave and devised all his real estates to his trustees upon trust to divide and apportion the same between the persons there mentioned; and the testator, after stating that he was possessed of

valuable building estates at West Norwood, Surrey, and elsewhere, and that he had made certain building agreements and had agreed to make loan advances to builders, expressly directed his trustees to carry out such building agreements and to make advances as fully and effectually as he himself could have done, and to postpone the sale and conversion of any land or estates ; and he empowered them to lay out the same for building purposes and to grant leases not exceeding ninety-nine years in duration.

The testator died on June 15, 1897, and the plaintiffs were two of the present trustees of the will.

At the date of the testator's death he was possessed of two freehold building estates known respectively as the St. John's Lodge estate and the Broadway, West Norwood.

By a building agreement dated July 9, 1895, made between the testator as landlord and lessor and James Robert Maley as tenant, it was agreed that Charles Blake should let to J. R. Maley upon the terms and conditions therein contained all the several pieces or parcels of land known as the St. John's Lodge estate for ninety-nine years from March 25, 1895, at a rent of a peppercorn up to September 29, 1896, and afterwards at a rent of 500*l.* for the first year and increasing up to 1500*l.* a year. The agreement provided (by clause 3) that J. R. Maley should build and completely finish on the specified lands 240 messuages of the values there stated. By clause 13, on the houses being finished fit for habitation, the landlord was to grant to the tenant leases of such houses for ninety-nine years from March 25, 1895. Clauses 19 and 20 gave to the lessor in certain events power to re-enter into possession and to complete any buildings, the tenant to repay the moneys expended by the lessor, which moneys, with interest thereon, were to be a charge upon the demised premises. By clause 21 it was declared that if the tenant should be desirous of purchasing the reversion in fee simple in the whole or any part of the premises thereby demised at the price of twenty-five years' purchase on the standing rental thereby reserved in respect of the parcel of land which the tenant should desire to purchase, and should, before June 24, 1900, give the lessor notice in writing to that effect, in such case the tenant should be deemed the purchaser of such reversion at such price of twenty-five years' purchase as from the date of such notice, subject to three stated

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conditions ; and it was also thereby expressly agreed and declared that the power thereinbefore contained should not be exercisable by the tenant if at any time before the actual completion of such purchase the vendor should have exercised, or taken any proceedings for the purpose of exercising, the powers of re-entry reserved by clauses 19 and 20 thereof. By clause 23 it was provided that the landlord would advance to the tenant certain sums there specified, not exceeding 6000*l.* to be owing at any one time, such advance to be a charge upon all and every the messuages and premises.

The testator during his lifetime made various advances to J. R. Maley under the provisions of the building agreement, and after his death his trustees continued to make advances and granted various leases of houses at Knights Hill, West Norwood.

On September 28, 1899, J. R. Maley, by his solicitor, gave notice in writing to the solicitors for the trustees that J. R. Maley would exercise the option conferred on him by the building agreement to purchase the fee simple of so much of the St. John's Lodge estate as he had already built upon, consisting of twenty houses, Nos. 130 to 168 (even numbers inclusive), Knights Hill, including the houses of which leases had been granted.

J. R. Maley died on December 25, 1899, and his estate was wholly insufficient to enable his executors to carry out the purchase of the twenty houses, or to perform his obligations under the agreement of July 9, 1895.

On December 14, 1900, the testator's trustees served notice on the executors of J. R. Maley of their intention, under clause 19 of the agreement, to enter and take possession of the land agreed to be let (other than the portions leased), and they accordingly entered into possession. A sum of 1650*l.* was now due to the testator's trustees in respect of advances made for building and completing houses. The testator's widow died on July 27, 1915.

On January 27, 1916, an originating summons was taken out by the plaintiffs, asking, *inter alia*, (1.) whether, upon the true construction thereof and in the events which had happened, the trustees ought to treat the St. John's Lodge estate as being charged in favour of the persons beneficially entitled to the testator's residuary personal estate with the principal sum of 1650*l.*, or any and what other sum ; (2.) whether the premises Nos. 130

to 168 (even numbers only) at Knights Hill Road, West Norwood, ought, in the events which had happened, to be treated as forming part of the testator's real estate or of his residuary personal estate.

The first defendant, Harry Edward Blake, represented the persons entitled to the real estate of the testator, of which he took one sixth under the terms of his will. The second defendant, Emma Alma Packer, represented the personal estate, of which she took one twenty-sixth share. The third defendant, Ada Matilda Shrimpton Giles, was the other trustee of the testator's will.

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Fairfax Luxmoore (for *F. H. L. Errington*, serving with His Majesty's Forces), for the trustees of the will, stated the facts and asked for a decision on the second question first.

H. B. Vaisey, for the first defendant, representing the realty. With regard to the twenty houses at West Hill, Norwood, they must be treated as now forming part of the testator's real estate. There was no conversion into realty under the circumstances. The principle laid down in *Lawes v. Bennett* (1) is not disputed, but in that case 3000*l.* had been in fact paid in pursuance of an option to purchase, and that sum was accordingly held to form part of the testator's personal estate. The principle there applied is not to be extended: *Theobald on Wills*, 7th ed. p. 261; *Townley v. Bedwell* (2); *Edwards v. West* (3); *In re Isaacs*. (4) In the present case the purchase was never in fact carried out, and that fact distinguishes the case from *Lawes v. Bennett*. (1) It would be an extension of the principle to apply it to the present case. But if the mere fact of giving the notice to exercise the option is to be deemed to work a conversion, then I submit that under the circumstances here there has been a reconversion into realty. The contract to purchase is non-existent, having been rescinded by the vendor's trustees who re-entered upon the property. The mere service of the notice to purchase cannot have the effect contended for by representatives of the personal estate having regard to the proviso at the end of clause 21 of the building agreement to the effect that the power was not to be exercisable by the tenant if the vendor had

(1) (1785) 1 Cox, 167.

(2) (1808) 14 Ves. 591.

(3) (1878) 7 Ch. D. 858.

(4) [1894] 3 Ch. 506.

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taken proceedings with a view to re-entry. The event contemplated has happened. The option has therefore gone, and Mr. Maley never became the purchaser of this property, and it is in fact still realty.

J. W. Manning, for the representative of those entitled to the personal estate of the testator. The notice to exercise the option works an absolute conversion of this realty into personalty. It must be taken to be settled by the authorities that where notice has been given to exercise an option to purchase conversion takes place as from the date of the notice. A subsequent failure to carry out the purchase cannot have the effect of nullifying that rule. The building agreement here seems to have been drawn in accordance with the decisions of the authorities. The principle of *Lawes v. Bennett* (1) has been always recognized and applied in all similar cases: *In re Marlay* (2); *Collingwood v. Row*. (3) The persons entitled to the personalty take this property.

F. McMullan (for *L. W. Byrne*, serving with His Majesty's Forces), for another defendant, referred to *Bennett v. Earl of Tankerville*. (4)

H. B. Vaisey in reply.

EVE J. I am of opinion that the premises referred to in the second question in the summons must be treated as personalty and not as realty.

Mr. Maley on September 28, 1899, having then become entitled to leases of the twenty houses in question, gave notice of his desire to purchase the freehold reversion of those houses, and according to the terms of the contract that purchase should have been completed on December 25 following. But at or about that time Mr. Maley's inability to complete the purchase was demonstrated by the fact that he died on the very day fixed for completion in an impecunious condition. In these circumstances no steps were taken by the trustees of the testator's will to enforce the contract, and ultimately, after the lapse of another year, they were constrained to exercise their power of re-entry under the building agreement, and resumed, and still retain, possession of the whole property, including these twenty houses.

It has been argued on behalf of the devisees of the real estate under

(1) 1 Cox, 167.

(2) [1915] 2 Ch. 264.

(3) (1857) 26 L. J. (Ch.) 649.

(4) (1811) 19 Ves. 170.

the testator's will that, inasmuch as the notice exercising the option never had any effective operation, the Court ought not to hold that the notice brought about a final conversion of the realty into personality. Even if the notice operated in the first instance to work the conversion, it is suggested that subsequent events worked a reconversion. The result to which this argument, if sound, would lead would be that between the date of the testator's death and the giving of the notice the property was realty; then between the date of the giving of the notice and some other date not very easily ascertainable, but which would at the earliest have been the date when it was obvious that the contract would not be carried out, and at the latest the date of re-entry, the property was personality, and finally at the uncertain date to which I have just referred it reverted to its original character and became realty again. No authority has been cited for such a proposition, and I do not think I ought to accede to an argument calculated to introduce so much uncertainty and confusion. The impossibility alone of fixing in many cases the exact date of the final reconversion is, I think, a sufficient answer to this argument.

In my opinion it is now well settled by the authorities cited to-day that the giving of the notice exercising the option operated as a conversion once for all, and I cannot, in face of those authorities, hold that the mere fact that the exercise of the option was not followed by completion of the purchase prevented the conversion which had actually taken place from continuing to subsist. But it is further argued that, although this may be the result in an ordinary case where a simple option is exercised, there are special terms in this contract by which, in the event which has happened, that result is averted, and reliance is placed on the following proviso at the end of clause 21 of the building agreement as embodying those terms: "Provided always and it is hereby expressly agreed and declared that the power hereinbefore contained shall not be exercisable by the tenant if at any time before the actual completion of such purchase the vendor shall have exercised or shall have taken any proceedings for the purpose of exercising the powers"—putting it shortly—of re-entry. I do not see how that proviso can be construed as undoing that which has already been done, as restoring the same conditions as would have subsisted if no notice had been given and no contract

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EVE J. to purchase had been thereby set on foot. All I think it means is
 1916 that, if between the exercise of the option and the actual completion
 BLAKE, of the purchase the vendor re-enters, it shall not be obligatory on
In re. the vendor to complete. In other words, the proviso recognizes the
 GAWTHORNE existence of the contract but relieves the vendor from the obligation
v. to carry it out. The property, in my opinion, is personalty and has
 BLAKE. been so since September 28, 1899.

To the first question asked by the summons, upon an affidavit being
 filed proving that the twenty houses were the only houses ever
 built, and that the whole of the advances made were made in respect
 of those houses, I am prepared to answer that no part of the 1650*l.*
 ought to be treated as charged upon any portion of the real estate.

Solicitors: *Mackrell, Maton, Godlee & Quincey; Ernest Bevir
 & Son, for Wilson & Sons, Salisbury; Taylor, Hoare & Jelf, for
 Nodder & Trethowan, Salisbury.*

G.

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In re DEPREZ.

HENRIQUES *v.* DEPREZ.

[1916 D. 162.]

*Will—Residue—Bequests to Children—Advances to Son—Direction in
 Codicil to bring into Hotchpot “advances appearing in books of
 account”—Entries in Books before and after Date of Codicil.*

A testator, who died in 1915, by his will made in 1909 and a
 codicil made in 1913, settled his residuary estate, subject to his
 wife's interest therein, upon trusts in equal thirds for his three
 children who survived him. By the codicil he directed that all
 sums of money appearing in his books of account to have been
 advanced by him to his son should be brought into hotchpot.
 There were no entries of advances in the books at the date of the
 will, but there were such entries between the dates of the will and
 of the codicil, and also after the date of the codicil. The son
 disputed the accuracy of the entries in the books:—

Held, that entries of advances made in the account books before
 the date of the codicil were incorporated in the will, but that
 entries made after that date were not receivable either as part of
 the will or as evidence, and an inquiry was directed.

E. DEPREZ, by his will dated September 27, 1909, after appointing
 his son Austin and the two plaintiffs his executors and trustees and

after making a specific devise and giving certain pecuniary legacies, NEVILLE J. devised and bequeathed unto his trustees all the residue of his real and personal estate upon trust for sale and conversion and out of the proceeds thereof to pay his debts, testamentary and funeral expenses, and legacies, and to stand possessed of the residue and the investments thereof (thereinafter called the residuary trust fund) upon trust to pay one third of the income thereof to his wife during her life. And the testator directed that, subject to his wife's interest, his trustees should hold the residuary trust fund as to one third upon trusts (as altered by a codicil) for the benefit of his son Austin and his wife and children, as to another third upon trusts for his daughter Elaine and (if she should marry) her husband and children, and as to the remaining third upon trusts for the benefit of his son Edmund and his wife and children. Then followed an accruer clause in the event of the failure or determination of the trusts therein before declared concerning any share in the residuary trust fund.

By the second codicil dated October 20, 1913, to his will the testator declared that "all sums of money appearing in my books of account to have been advanced by me to my son Edmund Francis George Deprez (exclusive of any annual allowance which I have from time to time made or shall hereafter make to him or to the trustees for him) shall in default of any direction to the contrary in writing under my hand be brought into hotchpot in the division of the residuary trust fund between my children or their issue as against my said son and his wife and children or other the person or persons interested in his share of the residuary trust fund."

The testator died in January, 1915, leaving him surviving his widow and his said three children. The son Austin executed a settlement on his marriage in October, 1913, and died in November, 1915, leaving a widow and an infant child.

All the testator's debts, testamentary and funeral expenses, and legacies had been paid, and for the purpose of adjusting the residuary trust estate the plaintiffs issued a summons to determine (amongst other questions) whether upon the true construction of the will and codicil and in the events which had happened the whole of the sum of 6824*l.*, or any and what sums, was to be treated as having been advanced by the testator to Edmund Deprez and to be brought into account by him.

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NEVILLE J. The only "books of account" among the papers of the testator which in any way corresponded with the books of account referred to in the codicil were two small memorandum books, which for the sake of convenience were respectively marked No. 1 and No. 2 by the trustees. All the entries in both books were in the handwriting of the testator and, with regard to his son Edmund, related to speculative transactions in land in Canada. These entries in book No. 1 appeared to commence after the date of the will and continued to about the end of the year 1912. In book No. 2, which was in existence in May, 1913, there was an entry under the date January 14, 1914, "on capital account" of three items, which were totalled at 6824*l*. The son Edmund admitted that sums amounting to 3420*l*. 14*s*. were chargeable as advances against his share of the residuary fund, but in other respects he disputed the accuracy of the entries in the books and denied that he had received 6824*l*.

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Sheldon, for the plaintiffs.

Ward Coldridge, K.C., and *Swords*, for the son Edmund. The cases show that a document referred to in a will cannot be incorporated with the will unless it is clearly identified by the description of it in the will and is shown to have been in existence at the date of the will: *Singleton v. Tomlinson* (1); *Quihampton v. Going* (2); *Whateley v. Spooner* (3); *Smith v. Conder*. (4) Here the entries of advances in book No. 1 were all made after the date of the will and must therefore be ruled out. For the same reason the items entered in book No. 2 in January, 1914, must also be ruled out. But if the entries in book No. 1, which were in existence at the date of the codicil, are receivable in evidence they are not conclusive evidence and are ambiguous, and there should be an inquiry.

H. J. Mackay, for the unmarried daughter. In order to give effect to the testator's intentions Edmund must bring into account the 6824*l*. The authorities are not disputed, and it is not necessary to incorporate the books of account as part of the will. The testator has indicated by reference to his books of account the advances that are to be brought into account. The items entered in book

(1) (1878) 3 App. Cas. 404.

(2) (1876) 24 W. R. 917.

(3) (1857) 3 K. & J. 542.

(4) (1878) 9 Ch. D. 170.

No. 2 on January 14, 1914, were all advanced before the date of the NEVILLE J. second codicil.

Bryan Farrer, for the widow and infant child of Austin and the trustee of his settlement. It is to our interest to support the contention of Mr. Mackay. The words "sums appearing in my books of account" in the second codicil are descriptive of what is to be brought into account. The testator has not said that all the advances made to Edmund are to be brought into account, but certain sums answering a particular description which would be found in his books of account. In other words, he says "You will find the entries of the advances in my books of account," not necessarily incorporating them with the will: *In re Arbuthnot*. (1)

Bovill, for the testator's widow.

Ward Coldridge, K.C., in reply. It is submitted that book No. 2 must be eliminated, and that book No. 1 is not sufficiently identified by the will. But if it is, it can only be looked at to see whether it contains a clear statement of the sums advanced, and there are no such entries in it: *In re Coyte*. (2) The proper course is an inquiry.

Cur. adv. vult.

Oct. 26. NEVILLE J. The testator by the second codicil to his will dated October 20, 1913, declared that all sums of money appearing in his books of account to have been advanced by him to his son Edmund (exclusive of any annual allowance which he had from time to time or should thereafter make to him) should in default of any direction to the contrary in writing under his hand be brought into hotchpot. In my opinion the reference to his books is general and not confined to entries made prior to the execution of the codicil. *Singleton v. Tomlinson* (3) and other cases show that documents not in existence at the date of the will cannot be included in its operation, and that no document can be incorporated unless it be shown both that it is the document intended and that it was in existence before the date of the will. In *Whateley v. Spooner* (4) Wood V.-C. held that a reference to a future statement made it evidence, but not conclusive evidence, of future advances. The

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(1) [1915] 1 Ch. 422.

(2) (1887) 56 L. T. 510, 514.

(3) 3 App. Cas. 404.

(4) 3 K. & J. 542.

NEVILLE J. words there were "as will appear in a statement in my handwriting."

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The Vice-Chancellor held these words to be mere words of reference forming no part of the identification of the subject and directed a general inquiry as to advances, apparently purporting to follow *England v. Downs*. (1) In that case there was an assignment of all and every the household goods, &c., and all other the effects of the assignor "to be more fully set forth and expressed in an inventory." There was no inventory, but it was held by Lord Langdale that the omission could be supplied by extrinsic evidence. He distinguished the case from that of *Weeks v. Maillardet* (2), where it was held that a bond to deliver "the whole of his mechanical pieces as per schedule annexed" was invalidated by the absence of a schedule at the time of execution. Neither of these cases seems to me very closely in point. It will be observed that in *England v. Downs* (1) an assignment by deed was not essential in equity. In *Kirk v. Eddowes* (3), where the testator had by his will settled a sum of 3000*l.* upon his daughter and her children and subsequently, at her request, had given a promissory note for 500*l.* to her husband accompanied by a parol declaration that it was to be in part satisfaction of the legacy, Wigram V.-C. admitted parol evidence of the declaration of the testator as part of the transaction. The decision is limited to this, as appears by the following words of the Vice-Chancellor: "Upon the whole, not holding that extrinsic evidence can, in any case, be admitted to alter, add to, or vary a written instrument, or to prove with what intention an instrument was executed,—nor that declarations of the testator, made at any other time than contemporaneously with the advance, and as part of the transaction the truth of which I am bound to ascertain, would, in this case, be admissible." This case is said by Warrington J. in *In re Shields* (4) to depend upon a personal obligation imposed on the person taking a benefit. I think that this must be the true explanation, though the fact that the legacy was settled and that the suit was brought by the children presents a difficulty in the way of that view. Hall V.-C. in *Smith v. Conder* (5) refused to receive evidence of subsequent declarations

(1) (1840) 2 Beav. 522, 536.

(3) (1844) 3 Hare, 509, 522.

(2) (1811) 14 East, 568.

(4) [1912] 1 Ch. 591, 599.

(5) 9 Ch. D. 170, 173.

of the testator and suggests a distinction from *Whateley v. NEVILLE J. Spooner* (1) in that in the case before him there was no reference in the will to a statement. His view that the marginal note in *Whateley v. Spooner* (1) does not accurately represent the judgment hardly seems to me justified. With regard to the reference in a will to a future statement, see the decision of Sargant J. in *In re Arbuthnot*. (2) How, having regard to the provisions of the Wills Act, a direction in a will can make a future declaration of the testator evidence I confess I have great difficulty in understanding. I should, however, of course follow the authorities so far as I thought them in point. In the present case, however, as I construe the will, the testator has not directed anything to be brought into hotchpot except sums appearing in his books of account to have been advanced, so that the words are words identifying the sums to be deducted and not mere words of reference, whatever that may mean. I think, therefore, that so far as entries of advances in the account books were made before October 20, 1913, those entries are incorporated in the will, and so far as they were made after that date I think I cannot receive them, either as part of the will or as evidence. The question remains whether the failure of the declaration as to future entries lets in the doctrine of the Court with regard to advances subsequent to the will. In my opinion it does not. The testator having expressed an intention in his second codicil with regard to such advances which has failed, I do not think that a different intention can be attributed to him by implication: see on this point *In re Coyte*. (3) I will therefore direct an inquiry whether any and what sums of money appear in the testator's books of account by entries made prior to October 20, 1913, to have been advanced by him to his son Edmund, exclusive of any annual allowance.

Solicitors: *Elkin & Henriques*; *Colyer & Colyer*; *Witty & Co.*; *Nicholl, Manisty & Co.*

(1) 3 K. & J. 542.

(2) [1915] 1 Ch. 422.

(3) 56 L. T. 510, 514.

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1916

Oct. 14, 26.

In re CHRIMES.LOCOVICH *v.* CHRIMES.

[1916 C. 2930.]

*Married Woman—Restraint on Anticipation—Partial Release by Deed
Poll while Discovert—Declaration—Direction to Trustees—Validity.*

The plaintiff, being then a spinster entitled to a reversionary share under a will subject to a restraint upon anticipation in the event of her marriage, by a deed poll executed before her marriage declared that her said reversionary share should in the event of her marriage belong to her for her separate use, and that for the purposes and subject to the conditions therein mentioned she should have full power to dispose of or charge the said share by way of anticipation or otherwise as she might think fit, but that except as therein provided nothing therein contained should prejudice the continuance of the said restraint. The deed poll was immediately communicated to the trustees of the will. Three mortgages pursuant to the conditions contained in the deed poll were made by the plaintiff while a married woman. On a summons taken out for the purpose of determining the validity of these mortgages and whether the plaintiff had power to make any future mortgages for the purposes declared by the deed poll:—

Held, that the deed poll operated by way of direction to the trustees, and thus amounted to a complete and effectual transfer of the plaintiff's share upon a new and modified trust, and that for the purposes and subject to the conditions imposed by the deed poll she had power to deal with her share by way of anticipation during coverture.

Seem, apart from its operation by way of direction, the declaration under seal would have been sufficient, as a release, to remove the protection attached to the original trust.

ADJOURNED SUMMONS.

This was an originating summons taken out by Daphne de Locovich and her husband, Iginio Vincenzo Verona de Locovich, as plaintiffs, against Grace Chrimes, Elizabeth Alice Glynes, Duffield, Bruty & Co., and the trustees of the will of Mary Chrimes, deceased, as defendants.

The following statement of facts is taken from his Lordship's written judgment:—"By the will dated March 20, 1903, of the testatrix, Mary Chrimes, deceased, her ultimate residuary estate was settled upon trust for P. H. C. Chrimes during his life, and,

after his death, upon trust for his wife, Grace Chrimes, if surviving, during life or widowhood ; and subject thereto in trust for all or any the children or child of the said P. H. C. Chrimes and Grace Chrimes who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should have attained or should attain that age or should have married or should marry, and if more than one in equal shares ; provided always, and it was thereby declared, that the share of the said trust premises therein-before expressed to be given in trust for any daughter of the said P. H. C. Chrimes and Grace Chrimes should in the event of her being married be for her separate use, and that she should not have power to dispose of or charge the same or any part thereof by way of anticipation.

“ At the date of the deed poll hereinafter mentioned, namely, October 21, 1913, there had been, as there are still, four children only, all daughters, of the said P. H. C. Chrimes and Grace Chrimes, of whom three, including the plaintiff Daphne de Locovich, then Daphne Chrimes, spinster (sometimes hereinafter referred to for brevity as the plaintiff), had attained the age of twenty-one years, and the fourth, Audrey Chrimes, was and still is an infant. Mr. P. H. C. Chrimes was an undischarged bankrupt, and his life interests under the will and under other instruments had been sold, and somewhat complicated arrangements were in course of negotiation or discussion under which sums might have to be raised on the reversionary interests of the plaintiff and of one of her sisters for the purpose of purchasing the prior interests in the trust funds or for the purpose of providing the plaintiff and her sister with an immediate income while their interests still remained reversionary. The possibility of effecting these arrangements was, however, imperilled by the fact that the plaintiff was about to be married to her present husband, and that she would on such marriage, apart from some special arrangement, lose the power of charging or disposing of her reversionary interest in the trust funds in question. And it is common ground that, whatever the precise effect or result of the deed poll of October 21, 1913, may be, it was in fact executed for the purpose of enabling the plaintiff to retain to some extent, notwithstanding her coverture, the power which she undoubtedly had while discoverd of disregarding the restraint on anticipation

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SARGANT J. sought to be imposed by the will and dealing with her reversionary interest as she chose.

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“Under these circumstances the plaintiff executed the deed poll of October 21, 1913. That instrument contains a recital of the will of the testatrix, Mary Chrimes, and recitals showing the state of the family, and then proceeds as follows: ‘Now these presents witness that the said Daphne Chrimes hereby declares that the share of the investments or property for the time being constituting or representing the residuary estate of the said Mary Chrimes deceased to which she the said Daphne Chrimes as a daughter of the said P. H. C. Chrimes and Grace Chrimes who has attained the age of twenty-one years is entitled under the said will of the said Mary Chrimes deceased, and also any further share of the said investments or property to which in the event of the death of the said Audrey Chrimes without having attained the age of twenty-one years or married under that age she the said Daphne Chrimes may become entitled as aforesaid, shall, in the event of her own marriage and subject to all prior interests (if any) for the time being affecting the said share or shares under the said will, belong to her for her separate use and so that, for the purpose of purchasing or contributing to the purchase of the said prior interests or any of them (either subject to or free from all or any incumbrances or incumbrance for the time being affecting the same) or of providing herself in any manner advised or approved by her solicitors Messrs. Duffield, Bruty & Co. or (if they shall be unable or unwilling to act as her solicitors in the matter) by a solicitor or solicitors to be nominated by the president for the time being of the Law Society with an income of not more than 300*l.* per annum (exclusively of income from any other source) during the continuance of such prior interests or any of them or for any less period (but not for any other purpose), she shall have full power to dispose of or charge the said share or shares or any portion of the same respectively by way of anticipation or otherwise as she may think fit; provided always and the said Daphne Chrimes hereby further declares that except as provided by the foregoing power nothing hereinbefore contained shall prejudice or affect the incidence or continuance of the said restraint as regards the said share or shares and also that in the event of her marriage any interest purchased or income provided

under the foregoing power shall belong to her for her separate use and she shall not have power to anticipate.' SARGANT J.

"The deed poll, though dated October 21, 1913, was executed on the following day, October 22, and, as is admitted, was forthwith communicated to the trustees of the will. On the same day as, but after the execution of, the deed poll the plaintiff was married to her co-plaintiff Iginio Vincenzo Verona de Locovich; and since then advances have from time to time been provided for the plaintiff under the advice of the defendants Messrs. Duffield, Bruty & Co., in respect of which she has executed in favour of the defendant Elizabeth Alice Glynes three successive mortgages of her reversionary interest in the trust funds.

"Recently the plaintiff has changed her solicitors, and, on an attempt being made to raise further sums on the same security, doubts have arisen as to the position of the plaintiff, the defendant Elizabeth Alice Glynes, and the defendants Messrs. Duffield, Bruty & Co. It is to resolve these doubts that the present originating summons has been issued.

"The first and more important of the questions is this: 'Whether under and by virtue of the said deed poll executed by the plaintiff when discoverd and according to the true construction thereof the first-named plaintiff has power during her coverture to dispose of or charge by way of anticipation the share of residue bequeathed to her by the will of Mary Chrimes, deceased, subject to a proviso that during any coverture of the said plaintiff the same should be held by the trustees of the said will for her separate use and that she should not have power to dispose of the same by way of anticipation, and if so for what purposes and to what extent.'"

A second question raised by the summons was: "If the answer to the foregoing question shall be in the affirmative (and subject to any declaration as to the limits of the purposes and extent of her power), whether the exercise by the said plaintiff of such power is contingent (a) upon the previous advice or approval of the defendants Messrs. Duffield, Bruty & Co. being given in any event, or (b) upon the previous advice or approval of the defendants Messrs. Duffield, Bruty & Co. during such period only as the said plaintiff chooses to retain their services as her solicitors."

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SARGANT J. *Romer, K.C., and H. S. Preston*, for the summons. It is a matter of doubt whether it is more to the plaintiff's interest under the circumstances to argue in favour of the validity of the deed poll or against it. If the deed poll is open to doubt as a mere voluntary declaration of trust it might possibly under the existing facts be supported as an agreement for value: *In re Wood* (1) ; or the Court might release the restraint under the Conveyancing Act, 1911, s. 7.

A. Underhill and *A. M. Begg*, for the defendants other than the trustees of the will. The deed poll, even on the footing of a voluntary declaration, is valid and effectual for the purpose of releasing the restraint to the extent to which it goes. There can be no distinction for this purpose between a partial and complete release of the restraint. There appears to be no authority directly in point, but the observations of Kekewich J. in *In re Wood* (1) are in our favour. In that case Kekewich J. held that a covenant in an antenuptial settlement operated as a release of the restraint, and said : " It is said that she has done nothing more than covenant ; but I think that in sufficiently plain words she has done all that was necessary once for all. The settlement is a declaration by her that what was hers, subject to a restriction if she did not dispose of it, should be held on certain trusts." The law is correctly stated in Halsbury's Laws of England, vol. xvi. p. 375, as follows : " An unmarried woman or widow, entitled to property subject to a restraint on anticipation, may discharge the property from the restraint by any alienation or disposition thereof which is inconsistent with the continuance of the restraint, or by actually receiving the property and treating it as her own absolute property, or by a deed releasing the property from the restraint and declaring her intention to hold or enjoy it discharged therefrom " ; and in MacQueen's Law of Husband and Wife, 4th ed. p. 374, the writer, after stating that the restraint is inoperative while the woman is unmarried, continues : " But if she marry without having indicated an intention of discharging the property from the restraint upon anticipation, it will thereupon attach and become effective." Precedents founded on this view of the law are given in Key and Elphinstone, 10th ed. vol. i. p. 1132, and Encyclopædia of Forms

(1) (1889) 61 L. T. 197, 198.

and Precedents, vol. xv. p. 43. In the present case the deed poll is more than a mere declaration of intention, and, coupled with the fact that it was communicated to the trustees of the will before the marriage, amounts to a transfer of the plaintiff's equitable interest on a new and modified trust.

[SARGANT J. referred to *Richards v. Delbridge*. (1)]

Paterson v. Murphy (2) shows that what here took place would have amounted to a valid voluntary trust in favour of a third person. The general principles relating to the restraint on anticipation are found in *Tullett v. Armstrong* (3); see too *Wright v. Wright*. (4) If the form of the deed poll is defective in the present case the Court can cure it under the Conveyancing Act, 1911, s. 7.

[SARGANT J. That point would involve many other considerations upon which I have no sufficient materials before me.]

As regards the second question raised by the summons, the plaintiff's former solicitors are no longer desirous of acting in the matter, and on their declining to act the other provisions in the deed poll will come into effect.

Duka, for the trustees of the will, at the request of the Court argued against the validity of the deed poll. Assuming that the plaintiff prior to her marriage was in a position to overreach the restraint either wholly or partially, the question is whether she has in fact done so. I submit that by the deed poll she did not in fact anticipate anything, but only expressed her intention of doing so if after her marriage she thought fit. That is an attempt to alter the trusts of the will which it was not open to her to effect.

Romer, K.C., in reply, at the like request supported the same argument, and further referred to *Ellison v. Ellison* (5) and the notes to that case in *White and Tudor's Leading Cases*, 7th ed. vol. ii. p. 858.

Cur. adv. vult.

Oct. 26. SARGANT J. delivered the following written judgment, in which, after stating the facts as above set out and reading the first question raised by the summons, he continued: This question

(1) (1874) L. R. 18 Eq. 11.

(1840) 4 My. & Cr. 390.

(2) (1853) 11 Hare, 88.

(4) (1862) 2 J. & H. 647.

(3) (1838) 1 Beav. 1; on appeal

(5) (1802) 6 Ves. 656.

SARGANT J. obviously affects both the title of the existing mortgagee and the power of the plaintiff to make a title to any future mortgagee. And the objections to the title have been argued not only by the trustees but also at my request by Mr. Romer for the plaintiff, whose interests may perhaps be better served by the invalidity of the deed poll than by its validity. On behalf of the mortgagee a suggestion has been made that, even if the present title is invalid (which she of course denies), the original transaction may be shown to have been for value as part of a family arrangement, and so there may be a case for making good at least the existing mortgages; and it has also been suggested that the case is one under which the Court might think fit under the Conveyancing Act to relieve the plaintiff from the restraint on anticipation imposed by the will. But, for the present purpose, I must disregard both these suggestions and deal with the matter upon the terms of the deed poll as it stands and upon the basis that it was a purely voluntary transaction. On this footing it is urged against the plaintiff's power to mortgage since her marriage that, although a woman restrained from anticipation can while discoverd make an actual assignment so as to defeat the restraint, she cannot while discoverd alter the trusts in her favour by reserving to herself a power of prospective alienation during a future coverture. Or, in other words, the restraint during coverture can only be defeated to the extent of actual assignment during discoverdure. But, even if this view is sound, it will not avail those attacking the power here unless the deed poll did not on its true construction amount to a complete assignment.

Now, after a very careful consideration of the deed poll, I have come to the conclusion that it did constitute a complete assignment. It is addressed to all the world, and therefore to the trustees amongst others; and it is obviously intended to be, as it in fact was, communicated to them. And I cannot doubt, though it is not very artistically expressed, that it was intended to and does take effect as a solemn declaration and direction to the trustees that the plaintiff's share is to be held by them during her coverture subject to a partial restraint on anticipation only instead of a complete restraint. Now it is well established that in the case of an equitable interest outstanding in trustees or other holders a voluntary direction by the owner to the trustees or holders to hold the whole or

part of that interest upon trust for a third person operates as a complete and effectual transfer of the interest to which the direction extends : *Tierney v. Wood* (1) ; *Rycroft v. Christy* (2) ; *Bentley v. Mackay* (3) ; *Paterson v. Murphy*. (4) And, this being so, I can see no reason why a similar direction should not be sufficient to transfer to the owner herself a new or modified interest such as she could certainly have transferred by the same means to another. Some suggestion was indeed made that, even if the deed poll would have been effectual had it purported to get completely rid of the restraint on alienation, it has in fact failed because it only purported to release the restraint in part. But there seems to me to be nothing in this. The plaintiff, having the power while discoverd to alienate her share by way of direction, could, in my judgment, as readily give a direction under which the share should be subject to a modified restraint on alienation during coverture as one under which it should be completely free from such a restraint.

In the view I have taken of the matter it is unnecessary to consider whether the solemn declaration under seal in the deed poll would have been sufficient of itself, and apart from its operation by way of direction to the trustees, to remove the restraint on anticipation during a future coverture. But I should certainly hesitate very long before I held it insufficient. It might well operate by way of a release during discoverdure of a privilege or protection imposed for the benefit of the plaintiff during a future coverture. I notice that Kekewich J. in *In re Wood* (5), when holding that a covenant to settle operated on a subsequently acquired beneficial interest, although subject to a restraint on anticipation, laid stress, though perhaps unnecessarily, on the operation of the covenant as a declaration. And in two precedents which have been cited to me from works of reputation of deeds to get rid of restraints on anticipation reliance is placed partly, though not solely, on words of declaration similar to those used here.

Accordingly I answer the first question by declaring that for the purposes and subject to the conditions imposed by the deed poll the plaintiff Daphne de Locovich had and has power to dispose of or

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(1) (1854) 19 Beav. 330.

(3) (1851) 15 Beav. 12.

(2) (1840) 3 Beav. 238.

(4) 11 Hare, 88.

(5) 61 L. T. 197.

SARGANT J. charge her share by way of anticipation during coverture. [His Lordship then referred to the second question raised by the summons and continued :] Any doubt that might possibly arise in answering this question has been facilitated by Messrs. Duffield, Bruty & Co., who, now that they are not acting generally for the plaintiff, are, very properly, unwilling to embarrass her in the future transactions under the deed poll which she is contemplating, and therefore declare themselves unwilling to act. As to this question, the order should run : It appearing that Messrs. Duffield, Bruty & Co. by their counsel declare themselves unwilling to further act as the solicitors of the plaintiff in the matter, the Court declares that the provisions expressed in the deed poll in the event of Messrs. Duffield, Bruty & Co. being unable or unwilling to act have now come into force.

Solicitors : *Sutton, Ommanney & Rendall ; Duffield, Bruty & Co. ; Radford & Frankland, for Pashley & Hodgkinson, Rotherham.*

A. C.

YOUNGER
J.

1916
Oct. 20 ;
Nov. 3.

In re WALKER.

DUNKERLY *v.* HEWERDINE.

[1916 W. 754.]

*Will—Construction—Tenant for Life—“ Die leaving issue her surviving ”
—Gift to Issue on attaining Twenty-one—Death of Child after Twenty-one in Lifetime of Tenant for Life—Vested Interest.*

Testator, who died in November, 1882, by his will, made a few weeks previously, devised and bequeathed the residue of his real and personal estate to his trustees upon trust for sale, conversion, and investment, and directed that after payment of certain annuities his trustees should divide the balance of the annual income into five equal parts and pay one fifth part to each of his four daughters, naming them, of whom L. H. was one, during their respective lives, and the remaining fifth part for the benefit of the children of a deceased daughter. The testator then directed that, in case any of his said daughters should die without leaving lawful issue her surviving, or such issue should die under the age of twenty-one years, the share or shares of her so dying as aforesaid of and in the said trust premises should be held by his trustees and the annual

income applied between and amongst such of his said daughters as might be then living and the issue of such of them as might be then dead, but such issue should only take per stirpes and not per capita; and upon the death of any of his said daughters leaving issue her surviving he directed that the share of such daughter so dying should be paid and divided between the issue of his said daughters on their severally attaining their respective ages of twenty-one years if more than one in equal shares and proportions, and if there should be issue but one child, then the whole to such one child. L. H. died in December, 1915, a widow, having had eleven children, six of whom survived her and attained twenty-one. Of the remaining five children who predeceased her two died in infancy and three attained twenty-one:—

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Held, that on the death of L. H. her one fifth share became divisible in equal shares amongst all her children then living and the legal personal representatives of those then dead who survived the testator and attained twenty-one.

The principle laid down by Turner L.J. in *Boulton v. Beard* (1853) 3 D. M. & G. 608, 612, approved of by Lord Davey in *Hickling v. Fair* [1899] A. C. 15, 35, and followed by Hall V.-C. in *In re Orlebar's Settlement Trusts* (1875) L. R. 20 Eq. 711, applied.

ADJOURNED SUMMONS.

Joseph Walker, by his will dated October 13, 1882, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell, call in, and convert and out of the proceeds to pay his funeral and testamentary expenses and debts and to invest the residue of the proceeds as therein directed and out of the annual income thereof to pay certain annuities to his wife, his daughter Betsey, and his son Toft, and to divide the balance of such annual income into five equal parts or shares and to pay one fifth part thereof unto his daughter Sarah Bernard, one other fifth part thereof unto his daughter Ann Dunkerly, one other fifth part thereof to his daughter Lucy Hewerdine, and one other fifth part thereof to his daughter Diana Glover during their respective lives, and as to the remaining one fifth part thereof to pay and apply such annual income unto the infant children of his deceased daughter Joanna Rowson in such shares and proportions as to his said trustees or trustee should seem necessary or expedient for their maintenance and education until such time or times when such one fifth share of the said trust moneys became payable to them as thereafter directed amongst the issue of his said daughters. And he further declared that upon the death of his said

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wife and daughter Betsey and son Toft Walker respectively the said three annuities so given to them for life as aforesaid should cease and the same should from such respective times be divided amongst his said four daughters and the children of his deceased daughter Joanna Rowson in the same manner as before directed with respect to the balance of such annual income. The will then proceeded as follows : " And my will and mind is that in case any of my said daughters (except Betsey) shall die without leaving lawful issue her surviving or such issue shall die under the age of twenty-one years then I order and direct that the share or shares of her so dying as aforesaid of and in the said trust premises shall be held by my said trustees or trustee and the annual income thereof be paid and applied equally between and amongst such of my said daughters as may be then living and the issue of such of them as may be then dead but such issue shall only take per stirpes and not per capita. And upon the death of any of my said daughters (except Betsey) leaving issue her surviving then and in such case I order and direct the share of such daughter so dying as aforesaid of and in the said trust moneys and premises together with all accumulations (if any) by accruer or otherwise shall with all convenient speed be paid and divided between the issue of my said daughters on their severally attaining their respective ages of twenty-one years if more than one in equal shares and proportions and if there shall be issue but one child then the whole to such one child. And I direct that the interest dividends and annual produce of the expectant shares of each such child shall during their respective minorities be applied for and towards the maintenance education and support of such infant child or children."

The testator died on November 24, 1882.

Lucy Hewerdine survived her husband, G. F. Hewerdine, and died on December 24, 1915. She had eleven children, all born before the testator's death, six of whom survived her and attained twenty-one. Of the remaining five children two died in infancy and three attained twenty-one but died in the lifetime of their mother, the tenant for life, namely, W. H. Hewerdine, Lucy Dibb, formerly Lucy Hewerdine, and M. B. Hewerdine. The last named died intestate leaving a widow and two children, and no representation had been taken out to his estate.

This was an originating summons taken out by the sole present

trustee of the will for the determination (inter alia) of the question whether upon the true construction of the will and in the events which had happened the share of the testator's estate by the will settled on trusts for his daughter Lucy Hewerdine and her issue became on her death divisible in equal shares (a) amongst all her children who survived her and attained twenty-one years, or (b) amongst all her children now living and the legal personal representatives of her children now dead who survived the testator, whether such children survived her or attained the age of twenty-one or not, or (c) how otherwise the said share of the testator's residuary estate was now divisible.

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—

F. K. Archer, for the summons.

R. H. Hodge, for the legal personal representative of Lucy Dibb and the widow of M. B. Hewerdine. It is submitted that the children of Lucy Hewerdine were constituted a class at the death of the testator, and that as the only condition on which the gift was dependent, namely, that the tenant for life should have issue, was performed upon her death, all her children, whether living or dead, who had attained twenty-one shared in the share in which she had a life interest. The gift is not limited to those who survived the tenant for life, though none of the class could take unless one or more of them survived their mother, and the Court will not import the contingency of surviving the tenant for life into the constitution of the class: *Boulton v. Beard* (1), which was approved of by Lord Davey in *Hickling v. Fair*. (2) The rule is correctly stated in Theobald on Wills, 7th ed. at p. 593, but the subsequent statement on the same page that this construction is difficult, if not impossible, if there is a gift over if A. dies without children living at her death is not well founded. *Wilson v. Mount* (3), which is referred to in support of that statement, is commented on in *In re Orlebar's Settlement Trusts*. (4)

[YOUNGER J. *Wilson v. Mount* (3) was not cited in *Hickling v. Fair*. (5) Can it stand with that case ?]

It is submitted that it cannot. If the contingency does not

(1) 3 D. M. & G. 608, 612.

(3) (1854) 19 Beav. 292.

(2) [1899] A. C. 15, 35.

(4) L. R. 20 Eq. 711.

(5) [1899] A. C. 15.

YOUNGER J. happen none of the class takes, and the gift over merely provides for the destination in that event of the fund which otherwise would be undisposed of. [He also referred to Jarman on Wills, 6th ed. pp. 1390, 1725.]

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HEWERDINE. *Meyrick Beebee*, for the children of M. B. Hewerdine, adopted the same argument and referred to *Bythesea v. Bythesea*. (1)

Dighton Pollock, for the children of Lucy Hewerdine who survived her. It is submitted that in this will the word "issue" is confined to children and that only the children of Lucy Hewerdine who survived her are entitled: *Stevens v. Pyle* (2); *Selby v. Whittaker*. (3)

[YOUNGER J. *Selby v. Whittaker* (3) would be a strong case in your favour if it were not for the remarks of Lord Davey in *Hickling v. Fair*. (4)]

Here the actual words of the will point to the children who are to take being in esse at the death of the tenant for life. It is submitted that the testator there means children if they survived their parent and attained twenty-one years.

Cur. adv. vult.

Nov. 3. YOUNGER J. The question in this case is how the share in the residue of the testator's estate to which his daughter Lucy Hewerdine was entitled for her life is now divisible. Lucy Hewerdine died on December 24, 1915, a widow. She had eleven children, six of whom survived her. These are the first six defendants to the summons, and they have all attained twenty-one. Of her remaining five children, who died in her lifetime, two died in infancy and three attained twenty-one.

The question is whether the estates of these last three who attained twenty-one but died in the lifetime of their mother, the tenant for life, are entitled to participate in the fund along with her surviving children. [His Lordship then stated the provisions of the will as above set out and continued:]

Now I am of opinion on the construction of the clauses of the will which I have read that their effect taken together is to make it necessary for a child of a daughter to attain twenty-one if he or she is to be included in the class to take, so that the substantial

(1) (1854) 23 L. J. (Ch.) 1004.

(2) (1861) 30 Beav. 284.

(3) (1877) 6 Ch. D. 239.

(4) [1899] A. C. 15, 37.

question is whether there is a further condition attached to the gift to the children of the daughter Lucy Hewerdine that they shall survive her.

The law on the subject is quite clearly laid down first in the case of *Boulton v. Beard* (1), where Turner L.J. states the principle with reference to this matter in the following words: "That argument would go to a great extent and affect many decisions, affirming as it must the principle that where there is a gift to a class upon a contingent event, the time of the happening of the contingency determines the individuals composing the class. That is not the rule." Then at the end of his judgment he says: "In this case the gift to the children in the event of the parent leaving issue is absolute upon their attaining twenty-one, and the description of the children who are to take is not qualified."

The same principle of construction is enunciated by Lord Davey in *Hickling v. Fair* (2), where he says this: "It is an elementary principle in the construction of wills that a gift to a class after a life interest or a life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency." Then he refers with approval to the passage from the judgment of Turner L.J. in *Boulton v. Beard* (1) which I have just read.

Now there is, I think, no doubt that that is the principle *prima facie* applicable to a case like the present, although it does involve this result, that a child will lose an interest which otherwise he would take merely by the non-happening of an event which if it did happen would be of no advantage to the persons presumably intended to be thereby benefited. For this reason there are many cases in which the Courts have struggled against what may be called the orthodox construction in order to give effect to what may be presumed to have been the real intention of the testator, namely, that only children

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(1) 3 D. M. & G. 608, 612, 613.

(2) [1899] A. C. 15, 35.

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living at the death of the tenant for life are to take. Thus in *Selby v. Whittaker* (1) James L.J. says that the construction which I have alluded to as the orthodox construction "is a most monstrous and capricious intention to attribute to any testator"; and in the case of *Stevens v. Pyle* (2) the Master of the Rolls refused to adopt it because in the case before him it would have been a "preposterous intention" to attribute to the testator.

On the other hand, in *Hickling v. Fair* (3) Lord Davey, while admitting that the application of the rule made the gift unusual and one which might be called capricious, cited this passage from the judgment of Sir George Jessel in *Selby v. Whittaker* (4): "The only event in which there is a gift is upon their (the tenants for life) 'leaving lawful issue or other lineal descendants.' I fully admit that on the authorities and on the reason of the thing, if that stood alone followed by an immediate gift to children, though it might appear to be and would be a very capricious intention, because it would make the interests of the children, if they all died in their parent's lifetime, depend on whether one of them had left a grandchild who would not take anything; still there being no other words, that would not be sufficient to make the interests of the children contingent on their surviving their parents." Lord Davey then added: "Sir George Jessel in that passage relied, not only on the authorities, but (to use his own language) on 'the reason of the thing.'"

And the same principle was applied by Hall V.-C. in *In re Orlebar's Settlement Trusts*. (5)

In the result on the authorities it appears to me that in gifts like the present this principle must be adopted unless a clear indication that it is not applicable appears elsewhere in the will.

Now Mr. Pollock, who appears for the six surviving children of Mrs. Hewerdine, suggests that this clear indication is to be found here in the fact that the only gift to the issue of a daughter is in the direction to pay and divide on the death of the daughter, and he says that form of gift involves that the legatee shall be living to receive it. But Lord Davey in *Hickling v. Fair* (6)

(1) 6 Ch. D. 239, 249.

(2) 30 Beav. 284, 286.

(3) [1899] A. C. 15, 35.

(4) 6 Ch. D. 239, 245.

(5) L. R. 20 Eq. 711.

(6) [1899] A. C. 15, 37.

disposes of that argument. He says : “ I do not think that the gift, being in the form of a direction to divide, affords any context leading to a contrary conclusion. You can equally well allot a share to a deceased member of a class as a living one.” Reliance, for the same purpose, was placed upon the immediately preceding clause in the will. That clause has no direct reference to the present question, and as one of the testator’s daughters is still living, and it may well be that on her death the event actually contemplated by the clause will happen, it is undesirable that I should say anything more about it than is absolutely necessary. It is sufficient for present purposes to consider one matter only, namely, whether under that clause the issue who are to take must survive the period of distribution. It is clear to my mind that they are not required to survive that period. The result, therefore, is that there is nothing in the will to displace in this respect the principle of construction adopted by Turner L.J. and Lord Davey. I must accordingly declare that on the true construction of this will and in the events which have happened the share of the testator’s estate by the will settled on trusts for his daughter Lucy Hewerdine and her issue became on her death divisible in equal shares amongst all her children then living and the legal personal representatives of her children then dead who survived the testator and attained the age of twenty-one years.

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—

Solicitors : *Sharpe, Pritchard & Co., for B. Howlett & Son, Kirton-in-Lindsey ; F. W. Hill, for A. M. Jackson & Co., Hull ; Joynson-Hicks & Co.*

W. I. C.

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June 20 ;
July 26.

In re BLANDY JENKINS' ESTATE.
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[1916 J. 260.]

Settlement—Tenant in Tail—Disentailing Assurance—Protector of the Settlement—“Owner of prior estate”—“Bare trustee”—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 22, 27.

“Owner” of the prior estate, in s. 22 of the Fines and Recoveries Act, 1833, means beneficial owner.

A trustee who has no beneficial interest, whether or not he has duties to perform, is a “bare trustee” under s. 27.

Freeholds were settled to the use that J. B. J. should receive thereout a yearly rent-charge, and subject thereto that his wife surviving him should receive a yearly rent-charge, and subject thereto to the use of J. B. J. for life, with remainder to the use of trustees for a term of years if A. M. L. D. should so long live, and subject thereto to the use of the first and other sons of J. B. J. and his wife successively in tail male, with remainders over. The trusts of the term were to apply the rents and profits for the benefit of children or other issue of J. B. J. and his wife. J. B. J. died leaving his wife and a son (the plaintiff) and a daughter, both of whom were married but had no issue. A. M. L. D. was still living. The plaintiff desired to disentail:—

Held, that there was no protector of the settlement. (1.) The plaintiff and his sister were not protector, not being owners of the term, assuming it to be “the prior estate” within s. 22. (2.) The present trustees were not protector, being “assigns” of the original trustees and excluded by s. 27. (3.) Two surviving original trustees were not protector, never having been beneficial owners. The plaintiff could therefore disentail without consent.

ORIGINATING SUMMONS.

By an indenture of settlement dated August 17, 1891, made between John Blandy Jenkins the elder of the first part, John Blandy Jenkins the younger of the second part, Helen Mary Duffield, an infant, of the third part, and Robert Acton Blandy, George Denison Faber, Charles John Edwin Duffield, and Frank Hervey Aston Oakes (thereinafter called “the trustees”) of the fourth part (being a settlement made in contemplation of the marriage, shortly afterwards solemnized, between John Blandy Jenkins the younger and Helen Mary Duffield), freehold hereditaments being the Kingston Bagpuize estate were settled to the use of John Blandy

Jenkins the elder in fee simple until the intended marriage, and after the solemnization thereof to the use that John Blandy Jenkins the younger should receive out of the premises the yearly rent-charge of 800*l.* during the joint lives of himself and John Blandy Jenkins the elder, and subject thereto to the use that Helen Mary Duffield, if she should survive the said John Blandy Jenkins the younger (which event happened), should from and after his death receive out of the premises during the residue of her life the yearly rent-charge of 500*l.*, and also so long as she should remain the widow of John Blandy Jenkins the younger the further yearly rent-charge of 300*l.*, such further rent-charge to cease on her death or second marriage (which last event happened), and subject thereto to the use of John Blandy Jenkins the elder during his life, with remainder to the use of John Blandy Jenkins the younger during his life, with remainder to the use of the trustees for a term of ninety-nine years if Adela Mary Lavinia Duffield should so long live upon the trusts thereafter declared and subject thereto to the use of the first and other sons of John Blandy Jenkins the younger and Helen Mary Duffield successively in tail male, with remainder to the use of the same sons in tail general, with remainder to the use of all the daughters of John Blandy Jenkins the younger and Helen Mary Duffield in equal shares as tenants in common in tail general, with cross-remainders between them, with remainder to the use of Helen Mary Duffield during her life if she should so long remain the widow of John Blandy Jenkins the younger, with remainder after her death or second marriage (which last event happened) to the use of John Blandy Jenkins the younger in fee simple. And it was thereby declared that the premises thereby settled were limited, during the term of ninety-nine years if Adela Mary Lavinia Duffield should so long live, upon trust that the trustees for the time being thereof (thereinafter called "the trustees or trustee") should receive the rents, profits, and annual income of the premises thereby settled and pay and apply the same (or so much thereof as should not be required to pay the jointure rent-charges limited to Helen Mary Duffield and the outgoings and expenses which the trustees or trustee might think properly payable in respect of the premises) in or towards the maintenance, education, and support or otherwise for the benefit during the life of Adela

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J. the intended marriage in such shares and manner as the trustees or
1916 trustee might from time to time in their or his discretion and
BLANDY without control as to the exercise of such discretion think proper.
JENKINS' There was issue of the marriage two children only, namely,
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In re. 1892, and John Blandy Jenkins, the plaintiff, who was born in
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By an indenture dated September 29, 1898, the life estate of John Blandy Jenkins the elder under the settlement was surrendered to and merged in the life estate thereunder of John Blandy Jenkins the younger.

John Blandy Jenkins the younger died in 1901, leaving his wife, Helen Mary Jenkins, and their two children surviving.

Later in 1901 Robert Acton Blandy died.

In 1902 Helen Mary Jenkins married Frank Hervey Aston Oakes.

By an indenture dated February 13, 1903, John Blandy Jenkins the elder (in whom under the settlement was vested the power to appoint new trustees thereof) appointed Edward Anthony Strauss and Leolin Forestier Walker (two defendants) to be trustees of the settlement in the place of Robert Acton Blandy (deceased) and George Denison Faber (who retired from the trust, a defendant,) jointly with Charles John Edwin Duffield (a defendant) and Frank Hervey Aston Oakes, and he declared that the hereditaments subject to the settlement should vest in Charles John Edwin Duffield, Frank Hervey Aston Oakes, Edward Anthony Strauss, and Leolin Forestier Walker as joint trustees for the residue of the term of ninety-nine years upon the trusts of the settlement.

Frank Hervey Aston Oakes died in 1907.

In 1910 his widow, Helen Mary Oakes, remarried.

Helen Jenkins (now Helen Silver) married in 1914. In the same year the plaintiff married. There was no issue of either marriage.

By an indenture dated October 28, 1915, Charles John Edwin Duffield retired from the trusts of the settlement and released to the use of Leolin Forestier Walker and Edward Anthony Strauss the hereditaments comprised in the settlement, to hold the same on the trusts of the settlement.

The plaintiff was desirous of disentailing the estate, and took out this summons asking whether (a) Leolin Forestier Walker and Edward Anthony Strauss, as the present trustees of the settlement and term, or (b) George Denison Faber and Charles John Edwin Duffield, as the two surviving original trustees, or (c) the plaintiff and Helen Silver, as objects of the trust of the term, were protector of the settlement; or (d) whether the plaintiff could bar the estate in tail without any consent.

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H. T. Methold, for the plaintiff. "The owner of the prior estate" under s. 22 of the Fines and Recoveries Act, 1833, is always the beneficial owner. A trustee cannot be and was not intended by the Act to be protector; such an idea is inconsistent with the provisions of s. 22, all the elements of which indicate that a trustee shall not be protector unless he takes a beneficial interest. There are at least six indications of this in the section itself. It contemplates a person who (1.) can make an absolute disposition, (2.) may have charged or incumbered his estate, (3.) or absolutely disposed of it, (4.) or have become bankrupt or insolvent, (5.) or may have an estate by the curtesy, or (6.) an estate by way of resulting use, none of which can apply to the case of a trustee who has no beneficial interest. This view is supported by the Real Property Commissioners' First Report (1829), pp. 22, 30, 32, 33 (1), which preceded the Act and contemplated the beneficial owner throughout; by Hayes on Conveyancing, 5th ed. (1840), vol. i. pp. 166, 167, 168; by Sugden's Treatise on the New Statutes relating to Property, 2nd ed. (1862) pp. 214, 215; also by ss. 23 and 24 of the Act. The words "any estate for years determinable on the dropping of a life or lives" in s. 22 are a novelty introduced by the Legislature, the old tenant to the praecipe whom the protector displaces always requiring to have an estate of freehold: see Cruise on Fines and Recoveries, 3rd ed. vol. ii. p. 27, referring to *Smith v. Packhurst* (2); but the necessity of beneficial interest as characteristic of the protector is not superseded. Sect. 27, by

(1) First Report made to His Majesty by the Commissioners of England respecting Real Property. (presented pursuant to an appointed to inquire into the Law Address dated May 19, 1829).

(2) (1742) 3 Atk. 135, 136.



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referring to a "bare trustee," presents some difficulty. It speaks also of "assign." Sect. 22 shows protectorship cannot be assigned. A new trustee is *ex necessitate rei* an assign. If s. 22 is observed, an old trustee must remain protector after a new trustee is appointed. *Quod est absurdum*, showing the plaintiff's view is correct. Sect. 27 is redundant, and s. 22 excludes trustees who have no beneficial interest, and assigns, altogether. Sect. 32 enables the nomination of persons, including trustees, as protector, and a settlor can take advantage of that section, but in this case the settlors did not do so. A beneficial tenant for life, and not his trustee, would be protector: *In re Dudson's Contract* (1); *In re Ainslie* (2); *In re Hughes*. (3) If "bare trustee" in s. 27 means what Jessel M.R. in *Morgan v. Swansea Urban Sanitary Authority* (4) considered "bare trustee" to mean, namely, a trustee without beneficial interest, the plaintiff succeeds under s. 27. His whole case is that a "bare trustee" is a trustee who takes no beneficial interest, and that is what is to be taken to be the meaning of "bare trustee" in the Act. It is true that later and at other times "bare trustee" has been taken to mean a trustee who has no active duties to perform. But the plaintiff's view that in this Act it means a trustee who has no beneficial interest is supported by other sections of the Act besides s. 27—e.g. by s. 23, which is inconsistent with a trustee being protector, by s. 24, which would not fit in if a married woman was a trustee, and by s. 32, which provides a reason why a trustee should not be protector. Nothing in s. 31 detracts from this view. Thus there is nothing in the Act which allows a trustee to be protector. *Roe v. Reade* (5) shows Lord Kenyon's view of what was a bare or naked trustee in his day, the nudity consisting of his having no beneficial interest—a person who was merely a trustee and nothing else. It is true that in *In re Dudson's Contract* (6) Cotton L.J. said that, if an estate were given to a trustee during the life of a person upon trust to pay the rents and profits to the settlor's creditors, followed by a remainder in tail, the trustee, and not the creditors, would be the owner of the prior estate, but no argument was heard

(1) (1878) 8 Ch. D. 628, 632.

(3) [1906] 2 Ch. 642.

(2) (1884) 54 L. J. (Ch.) 8; 51
L. T. 780.

(4) (1878) 9 Ch. D. 582, 585.

(5) (1799) 8 T. R. 118, 122.

(6) 8 Ch. D. 628, 633.

on the other side, and what the Lord Justice said was obiter dictum, and the case as a whole supports the plaintiff's view. *In re Ainslie* (1) shows that one has to see who has the substantial interest in the property.

But if that view is wrong, and if "bare trustee" means a trustee who has no duties to perform, still the trustees here are excluded by s. 27, for they have no duties whatever to perform: *In re Hughes*. (2)

J. G. Wood, for the present and the two surviving original trustees. The trustees are protector, either the present trustees or the survivors of the original trustees. The introduction by the Legislature of "any estate for years determinable on the dropping of a life or lives" is important; there is no reason why a trustee, if he has the legal estate, shall not be protector, or should not have been tenant to the praecipe. There is no difficulty in applying "owner" in s. 22 to a trustee. A person who has the beneficial ownership has been held to be protector, but that is not an exhaustive definition, and, if there is no beneficial ownership, still there can be an owner who is protector. Sect. 22 does not say the protector must have a beneficial interest. If no trustee can be protector, if a trustee as such cannot be protector, the insertion of other sections excluding (s. 27) or including (s. 31) (as the case may be) a bare trustee is difficult to explain. This view is supported by what Cotton L.J. said in *In re Dudson's Contract* (3)—a trustee for creditors would be "owner of the prior estate" and therefore protector.

T. T. Methold, for Helen Silver. Neither this defendant nor the plaintiff can insist on any part of the rents being paid to her or him under the trusts of the term, but under the present circumstances they are together entitled to the whole of the rents, and, if the trustees are not protector, which this defendant submits they are, then the plaintiff and this defendant are together protector under s. 23. Jessel M.R.'s definition of "bare trustee" in *Morgan v. Swansea Urban Sanitary Authority* (4) was commented on unfavourably by Stirling J. in *In re Cunningham and Frayling*. (5) The

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(2) [1906] 2 Ch. 642.

(3) 8 Ch. D. 628, 633.

(4) 9 Ch. D. 582, 585.

(5) [1891] 2 Ch. 567, 572.

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trustees here do not come within the definition of "bare trustees" in *In re Cunningham and Frayling*. (1) They have many duties to perform and would be a most efficient protector. They are protector.

PETERSON J. The plaintiff in this case is the tenant in tail expectant upon a term of ninety-nine years if Mrs. Adela Mary Lavinia Blake shall so long live. The term is vested in two of the defendants, Leolin Forestier Walker and Edward Anthony Strauss, as trustees upon a discretionary trust for the maintenance, education, and support or otherwise for the benefit during the life of Mrs. Blake of the children or issue of the plaintiff's father, the only objects of the trust now being the plaintiff and his sister the defendant Helen Silver, neither of whom has at present any issue, and who therefore at present are solely interested in the trust. The plaintiff is desirous of disentailing the settled estate, and the question upon the present summons is whether there is any person whose consent as protector of the settlement must be obtained, and, if so, who is that protector.

There are three competitors who claim to be the protector. First, there are the present trustees of the term. Secondly, there are the two defendants George Denison Faber and Charles John Edwin Duffield, who are two of the original trustees and who have retired from the trust. Thirdly, under the claim advanced by Helen Silver, the plaintiff's sister, there are the plaintiff and herself as at present solely interested under the discretionary trust. As to the plaintiff and his sister, taking them first, I am of opinion that they are not the protector under the Fines and Recoveries Act, 1833. Sect. 22 of that Act provides that "if at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had

(1) [1891] 2 Ch. 567, 572.

been made, (the first of such prior estates, if more than one, being for all the purposes of this Act deemed the prior estate,) shall be the protector of the settlement." Now, assuming that the ninety-nine years' term is here a prior estate within the meaning of s. 22, the plaintiff and his sister are not "owners" of it. They cannot say that they are entitled to the whole income to be derived under the term *pur autre vie*, for the reason that, supposing some new issue of the plaintiff's father, children of the plaintiff or of his sister, were to come into existence, the trustees of the term might displace the plaintiff and his sister and refuse to allow them any interest in the term. In these circumstances it seems to me impossible for them to say that they are beneficial owners of the term.

Next I take the case of the present trustees. They have been appointed trustees of the term of ninety-nine years in place of the original trustees. Now s. 27 of the Fines and Recoveries Act enacts that "no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before December 31, 1833) no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement." In my opinion the present trustees are assigns of the original trustees and as such are prohibited by s. 27 from being the protector.

There is left the claim of the two remaining original trustees, the defendants George Denison Faber and Charles John Edwin Duffield. Now they have no interest in the term, because they have parted with the term to the predecessors of the present trustees and have no duties to perform. They are not owners of the term. But it is said that nevertheless they are the protector of the settlement because s. 22 provides that "the owner of the prior estate, or" the person "who would have been so if no absolute disposition had been made, shall be the protector of the settlement." It was contended that the original trustees were the owners of the prior estate, that the appointment of the new trustees and the vesting in them of the hereditaments comprised in the settlement was an "absolute disposition," and that therefore the remaining original trustees are still the protector of the settlement, because they

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would now have been owners of the term if it had not been assigned. The estate in the hereditaments comprised in the settlement has been vested in the new trustees by reason of the vesting declaration made by John Blandy Jenkins the elder, not himself a trustee of the term.

For the applicant it was contended that under s. 22 the "owner" of the prior estate is the beneficial owner, and not a trustee who has not any beneficial interest, and that this view is borne out by the proviso contained in s. 27 which prevents a "bare trustee" from being a protector. On the other hand, it was urged that a "bare trustee" means a trustee who has no beneficial interest and no duties to perform, and that the exclusion of such a trustee shows that a trustee with no beneficial interest who has duties to perform can be protector. There has been a considerable difference of judicial opinion on the meaning of the words "bare trustee." In 1799 the case of *Roe v. Reade* (1) was decided. In that case a testator devised certain lands to his brother-in-law upon trust to sell, give, devise, or otherwise dispose of the same among his four children in such manner and shares as he should by deed or will appoint; and Lord Kenyon C.J. in the course of his judgment said: "Now in this case the trustee (the devisor) had no beneficial interest in himself; he was a mere naked trustee, though the use was executed in him." The Chief Justice obviously considered that a trustee with no beneficial interest, to whom powers were intrusted, was a "mere naked trustee." In *Christie v. Ovington* (2) Hall V.-C. took the view that under the Vendor and Purchaser Act, 1874, a "bare trustee" meant a trustee to whose office no duties were originally attached or who, although such duties were originally attached to his office, would on the requisition of his cestuis que trust be compellable to convey the estate to them or by their direction. In *Morgan v. Swansea Urban Sanitary Authority* (3) Sir George Jessel M.R. inclined to the view that under the Land Transfer Act, 1875, a "bare trustee" or a "naked trustee" meant a trustee without any beneficial interest. In *In re Docwra* (4) Bacon V.-C. held under s. 6 of the Vendor and Purchaser Act, 1874, that two ladies who had no duty to perform except to obey the order of the Court were "bare trustees"; while in *In re Cunningham*

(1) 8 T. R. 118, 122.

(3) 9 Ch. D. 582.

(2) (1875) 1 Ch. D. 279.

(4) (1885) 29 Ch. D. 693.

and Frayling (1) Stirling J. preferred the view that, under s. 5 of the Vendor and Purchaser Act, 1874, and s. 48 of the Land Transfer Act, 1875, a trustee who has active duties to perform is not a "bare trustee."

The question, however, in the present case is what is the meaning of "bare trustee" in the Fines and Recoveries Act and whether in that Act it does not mean a mere trustee who has not any beneficial interest. As long ago as the year 1840, the view taken by Mr. Hayes in his *Introduction to Conveyancing*, 5th ed. (1840), vol. i. pp. 167, 168, of the meaning of the word "owner" in s. 22 of the Fines and Recoveries Act was stated as follows: "The protectorship is committed (s. 22) (subject to certain exceptions and provisions applicable to particular cases) to the person who shall be the owner, or who, but for an alienation, though absolute, and whether voluntary or involuntary, would have been the owner of the prior beneficial estate, or of the first of several prior beneficial estates, subsisting and created by the *same* settlement which created the entail, either being an estate for years determinable on a life or lives, or being any greater estate, other than an estate for years, —admitting, therefore, an estate for years determinable, (i.e. by death), however short the term, but excluding an estate for years absolute, however long the term." In 1862, in his *Treatise on the New Statutes relating to Property*, 2nd ed., ch. 2, s. 4 (14.), p. 215, Lord St. Leonards said: "The *estate* which confers upon its owner the office of a protector under the Act, may be indifferently either legal or equitable, provided it be vested in the party as owner. For the word estate is declared to mean an estate in equity as well as at law;"—there he is referring to s. 1 of the Act—"and as, with reference to future settlements, the Act deprives a bare trustee of the right to the office, only the owner, whether of the legal or equitable estate, can be a protector in right of his estate." Having regard to that passage I think that Lord St. Leonards agreed with Mr. Hayes in the view that "owner" in s. 22 meant owner of the beneficial estate.

In *In re Dudson's Contract* (2) Jane McKnight, by her will dated October 14, 1803, devised real estate to J. Henderson and J. Tallentire and their heirs to the use of them and their heirs during

(1) [1891] 2 Ch. 567.

(2) 8 Ch. D. 628, 632, 633, 634.

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PETERSON the life of her daughter Jane Cockburn, in trust for the said Jane
 J. Cockburn for her separate use, and after her death to the use of the
 1916 first and other sons of Jane Cockburn successively in tail, with
 BLANDY remainders over. The testatrix died, and at the dates of her will and
 JENKINS' death the premises were subject to a mortgage in fee, and at the
 ESTATE, date of the deed next mentioned the legal estate was outstanding
In re in the mortgagee. By an indenture dated October 19, 1871, the
 BLANDY first tenant in tail under the will purported, with the consent of Jane
 JENKINS Cockburn as protector of the settlement, to bar the entail in the
 v. property and convey it to the use of himself in fee simple. The
 WALKER. question was whether the estate tail was effectually barred. That
 question turned upon another question, namely, who was the
 protector of the settlement under s. 22 of the Fines and Recoveries
 Act, 1833. James L.J. said : " In the year 1833 an Act was passed
 for providing new machinery for disentailing estates in lieu of the
 cumbrous process of suffering a common recovery. The 22nd
 section of this Act provides that where there is an estate for life
 subsisting prior to the estate tail, ' the person who shall be the owner
 of the prior estate, or the first of such prior estates if more than one,'
 shall be the protector of the settlement. The true construction of
 this clause of the Act was a matter of great importance, and from
 the time of the passing of the Act it has been the universal opinion
 and the universal practice of conveyancers that the ' owner of the
 prior estate ' meant the substantial owner of the estate, that is, the
 owner of the beneficial interest. That construction has been settled,
 and family settlements and purchases been made on the faith of
 it, for a period of forty-five years. And we have now been asked
 to introduce confusion into this state of things, and to say that
 what was understood by all lawyers to be settled was obviously wrong
 and contrary to the true construction of the Act of Parliament."
 Thesiger L.J. took the same view. " For forty-five years," he says,
 " one uniform construction has been placed on the 22nd section,
 and has been acted on by conveyancers. Therefore, before I could
 consent to overthrow this construction and adopt any other, I
 should require to be convinced that it was clearly opposed to the
 reasonable intention of the Act. Far from that, the construction
 which for forty-five years has prevailed appears to me the most
 reasonable construction."

In the view then of James L.J. and Thesiger L.J. the owner of the prior estate is the beneficial owner. Cotton L. J., however, in the course of his judgment observed : " It was suggested in argument that if an estate were given to trustees during the life of a person upon trust to pay the rents and profits to the settlor's creditors, followed by a remainder in tail, the effect of our decision would be that all the creditors would have to give their consent as protectors of the settlement. But in that case the trustee would be the owner of the prior estate ; it is impossible by any stretch of language to say that the creditors would be the owners of the estate." This passage, or that part, at least, of it in which it is stated that the trustee would be owner of the estate, appears to me to have been unnecessary for the purpose of deciding the case which was before the Court. In 1884 *In re Ainslie* (1) was decided. There lands were devised to trustees for a term of ninety-nine years if the testator's eldest son should so long live upon trust to manage and pay surplus rents and profits, after an annuity to the eldest son, to the second son Henry, and after the expiration or sooner determination thereof to the use of Henry for life, with remainder to the use of his first and other sons successively in tail male. It was held that Henry was protector of the settlement. Pearson J. said : " I think in this case, to use the words of the Court of Appeal in *In re Dudson's Contract* (2), I must look to see who is really the substantial owner for the time being of the estate. The property is devised to trustees, who take the legal estate for a term of ninety-nine years, upon trust thereout to pay to the elder son 250*l.* a year, to manage the estate, and to pay over all the surplus rents and profits to the second son Henry, and subject to the term the property is devised to Henry for life, with remainder to his sons in tail. The question is whether, under those circumstances, the second son ought not to be considered, and is not, the substantial owner of the estate. I think that he is. I think Montague, the eldest son, has simply a charge of 250*l.* upon the estate, which he is entitled to receive from the trustees ; he has no estate at all, he has simply an equitable right to the 250*l.* a year. With regard to the claim of the trustees it was very properly abandoned, because I conceive that it is settled beyond

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(1) 54 L. J. (Ch.) 8, 10 ; 51 L. T. (2) 8 Ch. D. 628.

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dispute that you are to look, not to those in whom the bare legal estate, or even the legal estate accompanied by some powers, is vested, but you are to look to the person who is the beneficial owner. The trustees certainly cannot be said to stand in the position of beneficial owners here in any way whatever. I think the first beneficial owner is Henry. The prior estate to the estate tail is in Mr. Henry Ainslie. Therefore I must so decide." Lastly, in *In re Hughes* (1), where a testator—I am reading from the head-note—who died on April 3, 1854, devised real estate to trustees during the lives of three persons and the survivor of them upon trust to pay certain annuities and accumulate the surplus rents and profits and hold them upon the trusts therein mentioned during the lives aforesaid, and from and after the termination of the estate limited to the trustees the testator devised the same to his grandson, John Hughes, in tail, and on July 14, 1875, John Hughes executed a disentailing deed in which the only survivor of the trustees joined as protector of the settlement, and subsequently by an order of the Court in 1879 it was declared that the trusts for accumulation contained in the testator's will were void as from April 3, 1875, the expiration of twenty-one years from the testator's death, and from that date the surplus rents and profits belonged to his heir-at-law, the father of John Hughes, it was held that at the date of the disentailing deed there was no protector of the settlement. The trustee was not protector, because he had no beneficial interest. The beneficial interest created by the will had come to an end, and the heir at-law, who was entitled to the beneficial interest, did not take under the settlement made by the will, and was also prevented from being protector by s. 27 of the Fines and Recoveries Act, which forbids an heir to be a protector. The disentailing deed therefore was valid. When I look at the judgment, however, I do not find that Swinfen Eady J. in express terms held that the trustee was not the protector because he had "no beneficial interest." The learned judge held that there was no protector, but he held that the trustee, whose duties under the will were, after the period for accumulating the surplus income had come to an end, confined to the payment of certain annuities, was not the protector.

It seems to me that in these circumstances it is not open to me to

determine that the original trustees were ever owners of the prior estate within the meaning of s. 22, as they were never the beneficial owners of it. If the section is carefully looked at, I think that its language supports this view. The words are: "the person who shall be the owner of the prior estate or who would have been so if no absolute disposition had been made shall be deemed the owner although the same may have been charged or incumbered either by the owner or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be required for the payment of the charges and incumbrances and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner" The section seems to contemplate the possibility that the owner may mortgage or absolutely dispose of the estate or that the estate may vest in the trustee in bankruptcy of the owner, and these provisions cannot refer to a trustee who has no beneficial interest in the estate which he holds as trustee.

I come therefore to the conclusion in this case that none of the persons who have claimed to be protector of the settlement are in fact protector, and the plaintiff can accordingly bar the entail without their consent.

Solicitors: *R. S. Taylor, Son & Humbert; Dale & Co., for Morland & Son, Abingdon.*

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July 14, 17,
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—*Settlement—Covenant to settle After-acquired Property—Chattels excepted
—Share of Personalty under Intestacy—Interest of Next of Kin.*

By a post-nuptial settlement, dated in October, 1908, a husband and wife covenanted that each of them would bring into settlement and make over to the trustees or trustee all the property of every kind (property consisting of a life interest or of income only or being of a value not exceeding 200*l.* and furniture, plate, jewels, and other chattels of personal, domestic, or household use excepted) to which they should respectively during their joint lives thereafter become entitled in possession by virtue of any gift or devise or bequest by will or under any settlement, or by virtue of any intestacy or other succession, the same to be held upon the trusts therein mentioned. In January, 1915, the husband's brother died intestate, and thereupon the husband became entitled as one of his next of kin to a one-sixth share of his personal estate, which before realization included pictures and furniture of considerable value. The pictures and furniture were sold in due course of administration, and in August, 1915, the husband executed an assignment to the trustees of the post-nuptial settlement of all his share and interest in the personal estate of his brother as one of the next of kin. In an action brought by the husband to rectify the deed of assignment by limiting the assignment to so much of such interest as he was in fact bound to assign under the post-nuptial settlement:—

Held, that the husband's only right at the moment of his brother's death was to have the administration of his estate carried out, the estate ascertained and realized wholly or so far as was necessary, and then, subject to payment of debts and administration expenses, to have paid to him one sixth of the net proceeds, with no right of property in or right to claim any part of the estate in specie prior to realization.

Dictum of Lord Davey in *Lord Sudeley v. Attorney-General* [1897] A. C. 21 followed.

Held, therefore, that the whole of the interest was bound by the covenant, and that, apart altogether from other difficulties, there was no case for rectification.

The decisions in *Cooper v. Cooper* (1874) L. R. 7 H. L. 53 and *Lord Sudeley v. Attorney-General* [1897] A. C. 11 are reconcilable on the ground that the interest of one of the next of kin in an intestate's estate, although sufficiently specific to raise a case of election, representing as that interest does all the money's worth of the

property comprised therein, is not sufficiently specific, apart from agreement with the other next of kin, where there are more than one, to enable any one of them to claim as his own any particular article from the administrator. .

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WITNESS ACTION.

This was an action by the Hon. Walter Vanneck claiming to have a deed of assignment dated August 26, 1915, and made between the plaintiff of the first part, his wife, the defendant Catherine Medora Vanneck, of the second part, and the defendants John Henry Sirrell Benham and William Voss of the third part, set aside or rectified.

The defendants Benham and Voss were sued as the trustees of a post-nuptial settlement dated October 30, 1908, and made between the same parties.

The following statement of facts is taken from the judgment of Younger J. :—" This is an action to rectify a deed of assignment to trustees of a post-nuptial settlement executed in October, 1908, by limiting the assignment thereby made of the interest of the plaintiff as one of the next of kin in the personal estate of his brother Lord Huntingfield to so much of such interest as he was in fact bound to assign by a covenant contained in the post-nuptial settlement, which was one made between the plaintiff of the first part, his wife, the defendant Mrs. Vanneck, of the second part, and the defendant trustees of the third part. It is alleged that the assignment actually made exceeds the obligation imposed upon the plaintiff by the covenant in question, and it is sought to limit it by the amount of such excess. The covenant is contained in clause 19 of the settlement and is as follows : ' Each of them the husband and wife shall further bring into settlement and make over to the trustees or trustee all the property of every kind (property consisting of a life interest or of income only or being of a value not exceeding 200*l.* and furniture plate jewels and other chattels of personal domestic or household use excepted) to which they shall respectively during their joint lives hereafter become entitled in possession by virtue of any gift or devise or bequest by will or under any settlement or by virtue of any intestacy or other succession the same to be held as to any property brought into settlement by the wife as part of the wife's fund and as to any property brought into settlement by the husband Upon trust to pay the income to the husband for his life and after his death

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to the wife if surviving for her life and after the death of both upon the trusts then subsisting hereunder as to the husband's fund Any such property consisting of real estate or lands or houses to be held upon trust for sale at the discretion of the trustees or trustee but subject to the consent of the husband or wife as the case may be by whom the same shall be brought into settlement during their respective lives Any such property consisting of investments may be retained though the investments be not of a kind herein authorised.' Clause 2 of the settlement contains provisions by which the wife had an obligation imposed upon her out of the income of the settled property which was given her by clause 1 for life to maintain a suitable house and provide therein a home for herself and the husband and the children of the husband and wife for the time being unmarried and willing to reside at home and to pay all the expenses of the establishment and upkeep of such home and of the maintenance thereat of the persons aforesaid ; and in clause 13 there is an assignment by the husband and wife of ' All those the articles of plate furniture pictures books and all other chattels and effects of household or domestic use or ornament which are now in or about or belong to the joint home of the husband and wife at Darsham aforesaid and including therein the articles of plate which were bequeathed to the husband by his grandmother Lady Huntingfield a list whereof in their present condition has been made and has been or will be delivered to the trustees which articles of plate as specified in such list are hereinafter referred to as " the scheduled plate " to hold the same unto the trustees ' upon the trusts therein mentioned.

" These clauses may be of some importance as tending to show that the range of the exception in the covenant in clause 19 is of articles capable of enjoyment in specie by the husband or wife of the kind already brought into settlement under clause 13 for the purposes of the home which was to be provided by the wife.

" Finally, in order to appreciate the whole situation, I must refer to clause 1 of the settlement, which provides that the trustees shall hold the husband's fund and the wife's fund upon trust to pay the income thereof to the wife during her life, and to clause 8, which is as follows : ' If during the joint lives of the husband and wife they shall not reside together in such home as aforesaid there shall be paid to the husband during the remainder of the said joint lives out of the income

of the husband's fund the annual sum of 65*l.*' subject to a possible deduction not material to be further referred to.

"Now Lord Huntingfield, Mr. Vanneck's brother, died on January 13, 1915, intestate. Upon his death Mr. Vanneck became entitled as one of his next of kin to a sixth share of his net personal estate. The remaining five sixth shares were divisible amongst the sisters of the intestate and the children of two deceased brothers. Some of these children may have been—I do not know—still in minority, and in any case it would seem from the correspondence that the plaintiff and his sisters were not on all points in complete agreement with reference to the administration of their brother's estate. The only particulars of that estate which I have before me consist of a rough estimate furnished to Mr. Voss by Mr. Ram, the intestate's solicitor, on January 20, 1915, and from that statement it appears that the net value of the whole personal estate after payment of duties was then approximately estimated to be 30,000*l.*, and the estimated value of the pictures, &c., was 15,200*l.* This value was in the result exceeded, and these articles realized at auction more than 21,000*l.*

"Mr. Voss was consulted by both Mr. and Mrs. Vanneck, and he held the opinion after reading the settlement, as appears from an entry in his bill of costs of January 18, 1915, that any interest which Mr. Vanneck took under the intestacy of Lord Huntingfield would be subject to the trusts of the post-nuptial settlement as after-acquired property. This opinion was formed by him on January 18, 1915, before he had any information as to the details of Lord Huntingfield's estate, but it was accepted by all parties, and on that footing instructions were given to counsel to prepare and settle an assignment of Mr. Vanneck's entire interest to the trustees pursuant to the covenant above stated. At the same time it was arranged between Mr. and Mrs. Vanneck that the 65*l.* per annum should be given up by Mr. Vanneck, while Mrs. Vanneck agreed to limit her interest in the fund brought in to 165*l.* per annum. Accordingly the deed of which rectification is now sought was executed on August 26, 1915. It recites the death and intestacy of Lord Huntingfield and that Mr. Vanneck, his brother, had become entitled as one of his next of kin to a one-sixth share of his personal estate and would, if the intestate left lands of copyhold tenure, be

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entitled to some share therein. The deed then recites that, though the husband and wife had for some years lived apart, no such deduction as provided for by clause 8 of the settlement had been made from the income of the husband's fund payable to the wife, and then that the trustees had called upon the husband to convey to them the share, estate, and property to which he had succeeded on such intestacy. It was then witnessed as follows: '1. The husband as settlor with the privity of the wife hereby grants assigns and conveys unto the trustees, first, all that the share estate and interest of him the husband in the personal estate of the said late Baron Huntingfield as one of his next of kin and all the moneys stocks funds securities and property which have become or shall become vested in or belonging to the husband as such next of kin or by any other succession by reason of the death of the said late Baron Huntingfield and, secondly, all the share or shares estate and interest to which the husband has become entitled to or which has descended upon the husband as an heir or co-heir or partial heir of the said late Baron Huntingfield by reason of his death intestate or which the husband has become entitled to by any other succession by reason of the death of the said late Baron Huntingfield To hold the same as to the said first described premises absolutely and as to the said secondly described premises unto and to the use of the trustees their heirs and assigns Nevertheless as to all the said premises Upon trusts and subject to the powers and provisions upon and subject to which the same ought to be held by virtue of clause 19 of the settlement as property which was liable by the provisions of such clause to be brought into and made subject to the trusts powers and provisions of the settlement.' Then clause 2 contains a release by the husband of his right to have paid to him under clause 8 of the settlement the annual sum of 65*l.*, and clause 3 contains a release by the wife of her right to the income of the fund brought in in excess of the sum of 165*l.* a year, and then by clause 4 the trustees are appointed attorneys of the husband to receive the share of Mr. Vanneck of the intestate's estate assigned by the deed.

"Now, as I have said, the next of kin were not in entire agreement as to the administration of Lord Huntingfield's estate, but they concurred in asking the Court to appoint the Public Trustee as administrator and he acted in that capacity, and after the estate had, as I

understand, been fully realized, he on December 14, 1915, wrote a letter to the plaintiff which raises for the first time the question I have to determine. His letter is as follows :—‘ Dear Sir,—*Huntingfield*—A. 174. I am directed by the Public Trustee to inform you that a copy of a deed of conveyance dated the 26th August, 1915, has been forwarded to him by Messrs. R. Voss & Son under which he observes you have conveyed all your share and interest in the estate of the above deceased to the trustees of your marriage settlement. It appears from the recitals in the conveyance that the trustees had called upon you to assure the property in question to them on the assumption that the whole of your share was bound by the covenant for settlement of future property. The Public Trustee has been advised by counsel that he cannot safely pay over to the trustees of the settlement the portion or share of Lord Huntingfield’s estate which represents proceeds of sale of furniture, plate, &c., as it appears from the terms of the settlement that they are expressly excluded from your covenant. Hence it would seem that the proceeds of sale of the furniture, &c., belong to you and not to your trustees. The Public Trustee, therefore, before taking any further steps thinks it desirable that the facts should be placed before you in order that you should appreciate that part of your share is probably excepted from the covenant to settle future property contained in the settlement, and if notwithstanding you still wish your full share to be paid to your settlement trustees a direction in writing to this effect should be obtained from you. The Public Trustee will be pleased to see you on the subject if you wish, but in any case it seems to be desirable that you should be separately advised by an independent solicitor as to your exact position.’ That intimation having been given, the result was this action.

“As above appears, the whole estate of Lord Huntingfield has been converted into cash. The plaintiff has not recovered, nor has there at any time been available for him to receive, any interest in the estate except a sum of cash.”

The only question calling for a report was as to the effect of the covenant to settle after-acquired property, and in the view taken by the Court of the facts the question of rectification did not arise. The arguments on that subject are accordingly omitted.

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Clauson, K.C., and *B. A. Hall*, for the plaintiff. What the plaintiff did by clause 1 of the assignment was in excess of what he was bound by the covenant to do. He was not bound to transfer the one-sixth of the chattels to which he became entitled under the intestacy. These were excepted from the covenant. As regards substantial proprietorship, the next of kin have at the moment of the death of the intestate a right to every item forming his personal estate, subject only to the paramount claims of his creditors: *Cooper v. Cooper* (1); *Blake v. Bayne* (2); *In re Dickson*. (3) *Lord Sudeley v. Attorney-General* (4) was a totally different case from *Cooper v. Cooper* (5), and, it is submitted, the Court should follow the latter rather than the former decision.

C. J. Mathew, K.C., and *J. E. Harman*, for the defendant Mrs. Vanneck. *Cooper v. Cooper* (5) merely decided that each of the next of kin is to be regarded as having an interest in each particular item of the intestate's property. It has, it is submitted, no application to the covenant in the present case. That covenant contemplates that the excepted chattels must be of such a nature as that they can be used and enjoyed, and there can be no use or enjoyment of, for example, one sixth of a picture. *Cooper v. Cooper* (5) had relation to a question of election. The Court there held that the next of kin were entitled to something more than an interest in the property after the payment of the debts and expenses. *Lord Sudeley v. Attorney-General* (4) is nearer to the present case. The question there was whether a one-fourth share of certain mortgages could be demanded in specie, and it was held that it could not. *In re Dickson* (3) shows that there is a distinction between the case where there is only one beneficiary and that where there are several. It is submitted that the only right the plaintiff had at the moment of the death was, to adapt the words of Lord Davey in *Lord Sudeley v. Attorney-General* (6) to the circumstances of this case, to have the administration completed, and the residuary estate ascertained and realized, either wholly or so far as might be necessary for the purpose, and to have the one sixth of the proceeds paid to him. He had no right of property in or right to claim any part of that estate in

(1) L. R. 7 H. L. 53, 64.

(2) [1908] A. C. 371, 383.

(3) [1890] W. N. 10.

(4) [1897] A. C. 11.

(5) L. R. 7 H. L. 53.

(6) [1897] A. C. 21.

specie. *Blake v. Bayne* (1) followed *Cooper v. Cooper* (2) and does not touch *Lord Sudeley v. Attorney-General*. (3)

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It is submitted, therefore, (1.) that on the construction of the covenant the exceptions contemplated by it are chattels which are capable of being enjoyed, and (2.) that *Cooper v. Cooper* (2) is not inconsistent with *Lord Sudeley v. Attorney-General* (3), and that the latter applies to the present case.

Hon. W. H. Cozens-Hardy, K.C., and *J. T. Prior*, for the trustees, took no part in the argument on this point.

Clauson, K.C., in reply.

Cur. adv. vult.

July 19. YOUNGER J. stated the facts as above set out and continued : In these circumstances the first question I have to determine is whether the whole interest of the plaintiff in his brother's estate was caught by the covenant, or whether, seeing that some part of the net sum representing Mr. Vanneck's ascertained share in the result of the administration owed its origin to the realization of articles of the description excepted from the covenant, his obligations under the covenant are reduced by the amount properly attributable to the ascertained value of these articles.

The answer to this question depends primarily on the true construction of the covenant, and it is asserted on Mr. Vanneck's behalf that his strict right as one of the next of kin of his brother was a right to a one-sixth interest in every picture, chair, table, spoon, ring or necklace, pot or pan, which remained in the hands of the administrator after payment of the intestate's debts and administration expenses. If that view were well founded and it were necessary for me to decide the case on that footing, I should be of opinion, for reasons already partly indicated, that on the true construction of the covenant in this settlement the exception did not extend so far and was not directed to such an interest. But it would be unsatisfactory to determine the case on so narrow, so debateable, and, it might be suggested, so grotesque a hypothesis. I therefore proceed to deal with the point at issue on more general grounds.

Mr. Clauson's contention on behalf of the plaintiff is that the next

(1) [1908] A. C. 371.

(2) L. R. 7 H. L. 53.

(3) [1897] A. C. 11.

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of kin of an intestate have at the moment of death, subject only to the claims of creditors, a substantial title to the whole of his property and a clear and tangible interest therein, and for that view he relies on *Blake v. Bayne*. (1) On the other hand, Mr. Mathew contends, and with equally high authority to support him, that Mr. Vanneck's only right at the moment of Lord Huntingfield's death was to have the administration completed and the estate realized, and then to have one sixth of the proceeds paid to him, with no right of property in nor any right to claim any part of that estate in specie : see per Lord Davey in *Lord Sudeley v. Attorney-General*. (2) Plainly, both of these views, divergent as they may seem, must, having regard to their origin, when properly applied, be capable of acceptance.

My task is to see which of them is applicable to the problem which in this case has to be solved.

Now, in confirmation of Mr. Clauson's contention there is, first, the case of *Cooper v. Cooper* (3), a decision which establishes first that the residuary legatee under a will has a clear and tangible interest in the residue, and that, the Statute of Distributions being nothing but a will made by the Legislature for an intestate, his next of kin stand with regard to his personal estate in the same position as does a residuary legatee under a will. The case next establishes, as stated in the head-note, that "The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete." That being the effect of the decision, it becomes important to see what are the facts of the case with reference to which it was given. A testator had devised an estate called Pain's Hill to trustees. That estate had by the testator been directed to be sold, and a power of appointment among his children had been given to the widow. The widow by deed, the property having in the meantime been sold, appointed the proceeds of sale to her sons in equal shares. Subsequently by her will she gave the whole of the estate, mentioning it specifically, to one of her sons, and

(1) [1908] A. C. 371, 383.

(2) [1897] A. C. 11.

(3) L. R. 7 H. L. 53.

by the same will she gave benefits to the second son and to the children of the third son, who had died intestate and whose children on his intestacy had become entitled to that one third appointed to their father. The question which had to be determined by the House of Lords was whether the interest of these children of the deceased son under the appointment, which interest they took only through the intestacy of their father, was such an interest in the estate of the father as to put them to their election to take either under the grandmother's will or under the appointment, and the answer to that question depended upon what their rights were in their father's intestacy. It was contended by those who appeared for the children that the interest which they took was no more than an undefined and intangible interest. Lord Cairns, dealing with that contention, says (1): "My Lords, it was very much pressed on your Lordships, in the extremely able argument we heard at the Bar from the counsel for the appellants, that the interest of a next of kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies [*quaere* expenses?]. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors. My Lords, this right of the next of kin I find extremely well expressed in a book, which, on this subject, is a book of high authority—Bacon's Abridgment—in the part of it which treats of executors and administrators. Speaking of the right of the next of kin, and of the statute regulating the succession to an intestate's estate, it says on the clause of the statute which directs

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that no distribution shall be within a year after the death of the intestate (1): ‘It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator; for the statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors. Also, this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over, and not the executor of the first testator.’” And again Lord Cairns says (2): “If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the Legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow—if, I say, we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest in specie in Pain’s Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate.” The effect of that decision I take to be this, that the interest which these children took under the intestacy of the father in, inter alia, the one third which had been appointed to the father by the grandmother was sufficiently specific to require them to elect between the benefits they took under the grandmother’s will and the appointed fund which under another name had been disposed of by that will. That fund came to them in form of money or money’s worth: for the purposes of election it was enough that in the result they had it in the form of money’s worth.

The next case referred to by Mr. Clauson, and mainly relied upon by him, was *Blake v. Bayne* (3) in the Privy Council. The judgment there was delivered by Lord Macnaghten. That was a case in which the claim was made under an administration bond in respect of

(1) Tit. Executors and Administrators I., s. 4, vol. iii. 7th ed. p. 506.

(2) L. R. 7 H. L. 66.

(3) [1908] A. C. 371.

breaches of duty by the administratrix, who was one of three sisters, in administering the mother's personal estate, and the circumstances were that, the debts of the mother having been paid, the management of the property was left in the hands of the administratrix as trustee for the other two sisters and herself, with the result that losses occurred. The other two sisters then commenced an action against the sureties who had given the administration bond in respect of alleged breaches of duty by the administratrix for which the sureties would be responsible, and it was held by the Privy Council that after the payment of the intestate's debts the three sisters were entitled to the residue of the estate in equal undivided shares, that they had elected to enjoy it in that form, and that in the circumstances it was not thereafter competent for the two sisters to maintain any claim against the sureties. In delivering the judgment of the Board, Lord Macnaghten, at p. 383, after reading the passage from Lord Cairns' judgment in *Cooper v. Cooper* (1) which I have already read, says this: "The opinion expressed by Lord Cairns and the other noble and learned Lords in *Cooper v. Cooper* (1) goes a long way to dispose of the whole case set up on behalf of the plaintiffs. Subject to the payment of debts, the whole estate was the absolute property of the three next of kin. The furniture and effects were theirs; the money was theirs; the houses were theirs. The debts were paid immediately after the death. If the next of kin chose to leave the whole estate just as it was in the hands of the eldest sister and under her absolute control (as the evidence shews, and as Holroyd J. finds, it was their desire and intention to do), there is no reason why effect should not be given to their wishes. As long as they lived together there was no reason for dividing the furniture. There was no reason for dividing the money. It was applied honestly and equally for their common benefit." And at p. 379 he says: "It is important to note the position of the estate when the deed of indemnity was signed. All the debts had been paid. There was no liability outstanding. The mother's estate was clear. The three sisters were equally entitled to it and every part of it in the actual state and condition in which it was. Without the consent of her two sisters it was neither the duty nor the right of the administratrix to convert the estate into money for the purpose

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of division or investment.” I think with regard to that case, and in particular to the passages I have read from the judgment, that all the Privy Council necessarily decided was that on the facts the whole of the personal estate was capable of fair division and that the parties interested had agreed to enjoy it in specie. I do not think that Lord Macnaghten intended to say—and there is a great deal to be urged against such a view—that the same result necessarily follows where that is not the case, where there has been no agreement to take in specie or where the estate consists of things which lose the whole or some of their value if divided, such things, for instance, as a pair of Oriental vases, which together may be worth much more than twice the value of each one of them separately. Moreover, on any other view the particular basis adopted in *Blake v. Bayne* (1) is not in harmony with the decision in *Cooper v. Cooper* (2) on which in another part of his judgment Lord Macnaghten relies, nor with *Lord Sudeley v. Attorney-General*. (3) Nor is it in harmony with the ordinary case of a trust for sale and division where every cestui que trust has the right to have the trust carried out because if not so carried out every beneficiary would not receive that which he has the right to claim.

That consideration brings me to the case of *Lord Sudeley v. Attorney-General*. (3) In that case the question arose whether a share in particular New Zealand mortgages which formed part of the residue of a testator's estate had become specifically the property of his widow, a residuary legatee who had died. If it had, the value of her interest in those mortgages would be exempted from probate duty payable on her estate in this country, and the House of Lords held that the right of the executors of the widow as a person interested in his residue was not a right to one fourth of the mortgages in specie, but was a right merely to require the husband's executors to administer his personal estate and to receive one fourth of the residue, and that probate duty therefore attached on the widow's interest therein. That decision of the House of Lords followed the reported judgments of the Court of Appeal (4), and I will read two passages from what the Lords Justices there said. Lopes L.J.

(1) [1908] A. C. 371.

19, 20, 21.

(2) L. R. 7 H. L. 53.

(4) Sub nom. *Attorney-General*

(3) [1897] A. C. 11, 15, 17, 18,

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remarks (1): "It is to be observed that neither Frances nor her executors could claim any part of this estate in specie: the executors of her husband were not trustees of the estate for her—all she was entitled to was her proportion of the proceeds of her husband's estate after realization." Kay L.J. says (2): "The one-fourth share of his residuary estate which belonged to Frances would still be an English asset, because neither she nor her executors would have any right to any of such investments in specie." When the case came before the House of Lords, Lord Halsbury, dealing with the matter, says: "It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money—and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say 'I will have this or that part of the assets.' If a trustee is to be the character filled, the cestui que trust has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted." And again: "the whole foundation of the argument is that the New Zealand mortgages are specifically the property of the legatee, which is a proposition which to my mind it is impossible to maintain." Lord Herschell says with regard to the widow's share of the residuary estate: "I agree with my noble and learned friend on the woolsack that the whole fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache, or they as her executors, were entitled to any part of these New Zealand mortgages as an asset—she in her own right, or they as executors of their testatrix. I do not think they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate. What she had a right to—what they as her executors had a right to—was one-fourth of the clear residue of Mr. Tollemache's estate—that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants. It seems to me, as my noble and

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learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist." And again: "Well, in that case how would it be possible to say that any one of the residuary legatees could point to any part of the assets of the testator and say, 'This is a part of my estate,' when it depends entirely on the method of administration by the trustees in what form the residue becoming divisible will exist when the administration is at an end?" So again: "In truth, the right she had was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth in what should prove to be the residuary estate of the testator." And Lord Macnaghten says: "I am of the same opinion. I think the point is a very short one, and I think the claim of the Crown is very clear. For my part I am quite content to adopt the judgments of Lopes L.J. and Kay L.J." Lord Shand says: "The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mr. Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets. They might have objected to accept the New Zealand mortgages if it had been proposed to allocate these to them as part of the residue, and the other parties interested might also have had valid objections to such an allocation. If Mr. Tollemache's executors had held the entire estate for behoof of his widow the case might have been different, but with other persons interested in an undivided and unrealized residue none of the beneficiaries had in themselves a right of ownership in particular assets of Mr. Tollemache's estate." And Lord Davey says: "What, then, are the rights of the appellants? Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realized, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them. The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions of the estate in satisfaction of any share by any fair agreement between the executors and the residuary legatees, or a scheme of division of that kind might no doubt be made by the executors

either with the sanction of the Court, or possibly at their own risk. In this case there has been no election to take the estate or any portion of it in specie, nor has there been any appropriation by the executors." A little further on he says: "My Lords, I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in or right to claim any part of the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered and to enforce that right by an action for the purpose, but had no right *virtute officii* to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie."

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The only other case to which I have been referred is *In re Dickson* (1), a case superficially very like the present, because in that case there was a covenant by a wife in a settlement of very much the same kind as in this case. What had happened was that the testator, who died in 1888, gave by his will all the residue of his estate to his executors upon trust for sale and after payment of his debts and funeral and testamentary expenses to hold the whole of that residue in trust for Lady D., the wife, who had entered into the covenant. The residuary estate consisted of certain household furniture and other articles of a like nature, and Lady D. claimed to elect to have the furniture in specie so that it might not be caught by the covenant. From the report of the case in 34 Sol. J. 181 it further appears that before the summons came on the furniture had been sold, but the sale had been made without prejudice to the question in what form Lady D. was entitled to take it, and what Stirling J. decided was that the fact that the lady had an interest under the covenant did not preclude her, being the only legatee, from electing to take the property in specie, and that therefore the furniture and other articles were by the very terms of the covenant excluded therefrom.

Now these are the cases on the point. It is unfortunate that *Cooper v. Cooper* (2), which is of course the foundation of Mr. Clauson's contention, was not cited in *Lord Sudeley v. Attorney-General* (3), especially as it was more relevant to the appellants' case than some of the cases that were cited. It is unfortunate also that

(1) [1890] W. N. 10.

(2) L. R. 7 H. L. 53.

(3) [1897] A. C. 11.

YOUNGER *Lord Sudeley v. Attorney-General* (1) was not cited in *Blake v.*
 J. *Bayne*. (2) But I think it is not difficult to arrive at the true dis-
 1916 tinction between the two lines of authority which at first sight may
 ~~~~~ seem to be in conflict. The distinction, it appears to me, is that an  
 VANNECK interest in an intestate's estate is sufficiently specific to raise a case of  
 v. election, representing as that interest does all the money's worth of  
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 ——— ciently specific, apart from agreement with the next of kin where there  
 are more than one, to enable any one of the next of kin to say to the  
 administrator "This or that thing is mine. Hand it over to me." Now  
 in the present case a sale was necessary. It was necessary to sell at  
 least part of Lord Huntingfield's estate for the purpose of ordinary  
 administration, and no agreement was come to not to sell the whole.  
 It may be that there were infants who had interests and that no such  
 agreement was possible. In any case, having regard to the correspondence,  
 I do not think such an agreement was practicable. At all events, no  
 such agreement was arrived at. At no moment of time, therefore, was  
 Mr. Vanneck entitled specifically to any part of Lord Huntingfield's  
 estate answering to the description of the property excepted from the  
 covenant. This view has the merit of convenience. Any other view  
 would involve a careful inquiry in each case and elaborate accounts  
 on insufficient materials where any claim to exemption was made by  
 a covenantor under such a covenant as we have here. That considera-  
 tion I quite agree ought not to affect the true construction of the  
 covenant, but it does not weaken the force of that which appears to  
 be its natural construction. In these circumstances it is unnecessary  
 to consider whether there was in this case any such mistake on the  
 part of Mr. Vanneck as would have entitled him to relief had my  
 view of his liability been different, but in case the matter should be  
 taken further I will say that in my view all the parties to the deed  
 of August, 1915, intended that the whole of Mr. Vanneck's interest  
 under his brother's intestacy should be assigned. I agree that all  
 that Mr. Vanneck was bound to assign was what was truly covered  
 by his covenant, but I am altogether in the dark as to what the  
 parties would have done if they had known or thought that he was  
 not bound to assign his whole interest in his brother's estate. I  
 am morally certain, how-

(1) [1897] A. C. 11.

(2) [1908] A. C. 371.

ever, that if they had thought his obligation was limited in the way Mr. Clauson suggested either no assignment would have been made at all or the parties would have agreed upon some figures being inserted in the deed to adjust their conflicting claims. In no circumstances would the deed have been executed in the form into which it is proposed to be rectified. In the result, however, I am of opinion upon the first ground that the action fails, but as the claim was first suggested to Mr. Vanneck by the Public Trustee, I think that he was justified in having the question decided by the Court. It would therefore be hard upon him to make him pay any of the costs. Accordingly I make no order in the action except that the costs of all parties shall be paid out of the fund assigned, the costs of the trustees and of Mrs. Vanneck to be taxed as between solicitor and client.

Solicitors: *Theodore Goddard & Co.*; *Lawrence, Graham & Co.*; *R. Voss & Son.*

W. I. C.

# MEEKING v. MEEKING.

[1916 M. 328.]

*Disentailing Deed—Resettlement—Mistake—Rectification of Disentailing Deed—Jurisdiction—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 40, 41, 47.*

Sect. 47 of the Fines and Recoveries Act, 1833, which in some respects excludes the jurisdiction of Courts of Equity in dealing with disentailing deeds, does not preclude the Court from exercising its jurisdiction to rectify any slip or clerical error in a disentailing deed which prevents the deed as executed from being the deed of the parties.

*Hall-Dare v. Hall-Dare* (1885) 31 Ch. D. 251 discussed and followed.

*Bankes v. Small* (1887) 36 Ch. D. 716 discussed and explained.

*In re Otley's Estate* [1910] 1 I. R. 1 not followed.

IN the year 1893 certain freehold lands stood limited, under the will of Charles Meeking's father, to the use of Charles Meeking for life, with remainder to the use of Bertram Meeking (the son of Charles) in tail, with remainder to the use of Charles Meeking in

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ASTBURY J. fee. In that year, in contemplation of the intended marriage of  
 1916 Bertram Meeking, it was agreed between him and his father that  
 MEEKING the lands should be disentailed and resettled.

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 — By an indenture of disentailing assurance, dated July 21, 1893,  
 made between Charles Meeking of the first part, Bertram Meeking  
 of the second part, and Marshall Pontifex of the third part, it was  
 witnessed that, with the consent of Charles Meeking, Bertram  
 Meeking conveyed and disposed of and Charles Meeking also con-  
 veyed, released, and confirmed unto Marshall Pontifex all the lands  
 and premises devised by the will of Charles Meeking's father which  
 were of freehold tenure and were then subject to the subsisting  
 limitations of the said will to hold the same unto Marshall Pontifex  
 (*sic*) freed from the estate for life of Charles Meeking the son and all  
 powers exercisable during such life estate and also freed from the  
 estate tail of Bertram Meeking and all remainders, reversions,  
 estates, rights, interests, and powers to take effect after determina-  
 tion or in defeasance of such estate tail, to such uses and upon such  
 trusts and in such manner generally as Charles Meeking and Bertram  
 Meeking should from time to time by deed jointly appoint, and in  
 default of such appointment to the uses which immediately before  
 the execution of the disentailing deed and under the provisions of  
 the said will were subsisting with reference to the premises thereby  
 conveyed. This deed was duly enrolled on July 29, 1893.

By a deed of resettlement made on the marriage of Bertram  
 Meeking, bearing even date with but executed after the disentailing  
 deed by, amongst other parties, the said Charles Meeking, Bertram  
 Meeking, and Marshall Pontifex, the freehold lands and heredita-  
 ments comprised in the disentailing deed were appointed to trustees  
 to the use of Charles Meeking for life, with remainder to the use of  
 Bertram Meeking for life, with remainders over, under which, in  
 the events which happened, the plaintiff, Violet Meeking, would,  
 subject to provisions thereby made for jointure for Bertram's  
 wife and portions for younger children, have been tenant in tail  
 male of the whole of the settled freeholds.

The marriage was duly solemnized, and there were issue of it  
 two daughters only, Violet Meeking, the plaintiff, and Daisy  
 Meeking, the first defendant, who, if the resettlement failed, would  
 have been entitled to the freeholds as coparceners under the



pre-existing uses. Bertram Meeking died in 1900, leaving his wife ASTBURY J. surviving. She was married again to H. Johnson in 1912, but was still entitled to some interest under the resettlement. Charles Meeking died in 1913, leaving a daughter by a second marriage, Sybille Meeking, who if the resettlement failed took under his will some interest in the property.

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The disentailing deed and the resettlement were executed by all parties thereto respectively under the belief that the whole fee simple in the disentailed freeholds was effectually conveyed by the disentailing deed to Marshall Pontifex as grantee to uses. The resettlement contained a recital that by the disentailing deed the freehold hereditaments therein referred to were conveyed unto Marshall Pontifex to hold unto Marshall Pontifex in fee simple, freed from the life and other estates and remainders over, as in the disentailing deed mentioned. It was afterwards, in 1916, discovered that the words "in fee simple" had been accidentally omitted in the habendum of the grant to Marshall Pontifex in the disentailing deed.

This action was commenced in February, 1916, by Violet Meeking, as plaintiff, asking for the rectification of the disentailing deed by adding the words "in fee simple" in the habendum immediately after the name of Marshall Pontifex.

The defendants were Daisy Meeking, Mrs. Johnson, Sybille Meeking, and the trustees of the resettlement.

The judge was satisfied by the evidence that the omission of the words "in fee simple" in the disentailing deed was a mere slip.

The sections of the Fines and Recoveries Act, 1833, on which the arguments turned are set out below. (1)

*Hon. Frank Russell, K.C., and Ashworth James* (for *Tyldesley Jones*, serving with His Majesty's Forces), for the plaintiff. There is an overwhelming case for rectifying the slip in the disentailing deed if the Court has jurisdiction to do it. It is suggested that the equitable jurisdiction is altogether excluded by s. 47 of the Fines and Recoveries Act, 1833. But that section only excludes the particular forms of equitable jurisdiction therein enumerated. It no doubt prevents a Court of Equity from aiding in any way

(1) See note on p. 91, post.



ASTBURY J. the effect of a document that the parties deliberately intended to execute in its actual form as their deed. But if owing to a slip or clerical error the document is not in fact the true deed of the parties, there is nothing in s. 47 to prevent rectification. This will put the deed right ab initio and no fresh enrolment will be necessary : *Hall-Dare v. Hall-Dare*. (1) In that case it is true that the disentailer and resettlement were contained in one deed, and it was only the resettlement portion that was rectified. The Court of Appeal, however, did not base their decision on that ground, but held in clear and unmistakable terms that s. 47 did not apply to rectification : see Halsbury's Laws of England, vol. xxiv. p. 258. The observations of Wylie J. in *In re Ottley's Estate* (2) to the effect that *Hall-Dare v. Hall-Dare* (1) only went to the rectification of a resettlement are not only obiter but entirely misconceived.

[ASTBURY J. I am clearly bound by the judgments in *Hall-Dare v. Hall-Dare*. (1) I had better hear the other side.]

*Micklem, K.C.*, and *Fairfax Luxmoore*, for the defendant Daisy Meeking. The facts raise a case for rectification, but the Court has no jurisdiction to rectify a disentailing deed. Sect. 47 prevents it putting a defective disposition right : Hayes on Conveyancing, 5th ed. vol. i. pp. 155, 163 ; Williams on Seisin, p. 184. The judgments in *Hall-Dare v. Hall-Dare* (1) must be read in connection with the question the Court had to decide, namely, their jurisdiction to rectify the resettlement. That this was the only point is absolutely clear from Mr. Hemming's argument before Bacon V.-C. and the Court of Appeal. (3) He admitted that, if the deed had been defective as a disentailing assurance, rectification would have been out of the question. That is the view of the decision adopted by Wylie J. in *In re Ottley's Estate* (2), and it is in complete accordance with the views as to s. 47 expressed by the Court of Appeal in *Bankes v. Small* (4) and by Stirling J. in *Mills v. Fox*. (5)

No doubt if Bertram had been alive there would have been no practical difficulty in putting matters right. He was under a clear contract to disentail, and though, having regard to ss. 40 and 47,

(1) 31 Ch. D. 251.

(2) [1910] 1 I. R. 1, 8, 9.

(3) 29 Ch. D. 133, 138 ; 31 Ch. D. 253.

(4) 36 Ch. D. 716, 723, 728—730.

(5) (1887) 37 Ch. D. 153, 162.

equity could not have treated that contract as an effective disentail- ASTBURY J.  
 ing assurance, it could have compelled him to execute a proper  
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 disentailing assurance. That, however, would have been specific  
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 performance of the contract, not rectification of the defective  
 v.  
 disposition, and there would have been no difficulty as to the  
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 enrolment of the new deed. In the present case, if rectification  
 ab initio were possible, it would be too late to enrol the rectified  
 deed under s. 41. It is very doubtful whether ss. 7, 8, and 9 apply  
 after the death of the tenant in tail.

There is a further point. The jurisdiction to rectify (if not  
 excluded by s. 47) rests on a contract or consensus express or  
 implied: *Bentley v. Mackay*. (1) It can therefore only be exercised  
 against parties or privies. Now on the death of Bertram in 1900  
 without having effectually disentailed Daisy became tenant in ta  
 of one moiety, not as claiming through Bertram, but by title  
 paramount per formam doni. The defective assurance cannot  
 therefore be rectified against her: *Attorney-General v. Day* (2);  
*Hinton v. Hinton* (3); *Frank v. Mainwaring*. (4)

What the Court is asked to do here is to take a deed which is  
 ineffectual in law, to do what the plaintiff says was intended, and  
 make it effectual. That is precisely what s. 47 forbids.

[ASTBURY J. referred to *Johnson v. Bragge* (5), where Cozens-  
 Hardy J. said that if rectification of a settlement was made by the  
 Court no further relief was necessary.]

Lord St. Leonards, in his *Real Property Statutes*, 2nd ed. (1862),  
 p. 221, sums up the effect of this statute: "It cannot be too  
 strongly impressed on purchasers, that their title will depend  
 upon the legal validity of the dispositions under the statute,  
 nothing can be supplied . . . . And although equity, notwith-  
 standing the stringent clauses in the Act, will still be able to compel  
 a seller to make a new valid conveyance, yet that could not be  
 enforced against the issue, nor could it be enforced against a  
 protector."

*E. Beaumont* (for *John Beaumont*, serving with His Majesty's  
 Forces), for Sybille, the daughter of Charles Meeking's second

(1) (1862) 4 D. F. & J. 279, 286. (3) (1755) 2 Ves. Sen. 631, 634.

(2) (1749) 1 Ves. Sen. 218, 224. (4) (1839) 2 Beav. 115, 125, 126.

(5) [1901] 1 Ch. 28.

ASTBURY J. marriage. Before the Act there was a power for the Court to rectify a fine or recovery, though it was very jealous of exercising it, but s. 47 clearly precludes a Court of Equity from rectifying the deed: *In re Wheeler and Heseltine* (1); *Dowse v. Reeve*. (2)  
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*Sheldon*, for Mrs. Johnson, referred to *Milbanke v. Jolliffe*. (3)  
*Dighton Pollock*, for the trustees of the resettlement.  
*Hon. Frank Russell, K.C.*, in reply.

ASTBURY J. (after stating the facts). The defendant who is most interested in opposing the rectification asked for is an infant, and counsel have very properly raised on her behalf all possible objections to the rectification. Those objections fall under two heads: first, that under s. 47 of the Fines and Recoveries Act there is no power in this Court to give the relief which is asked, and, secondly, that if such jurisdiction exists it is a case where the Court ought not to exercise it because the granting parties to the deed are dead, and Miss Daisy Meeking is now entitled by title paramount "per formam doni" under her great-grandfather's will.

The Fines and Recoveries Act, 1833, after providing that nothing contained in the Act shall lessen or take away the jurisdiction of any Court to amend any fine or common recovery or any proceeding therein in cases not provided for by the Act, enacted as follows: [His Lordship then read ss. 15, 41, and 47 of the Act and proceeded:] It is contended that s. 47 prohibits a Court of Equity from supplying any defect in the execution of a power of disposition given to a tenant in tail and from supplying under any circumstances a want of execution of such power of disposition, and that the omission by way of slip in the drawing up of the document in question is a defect in execution, or a want of execution, which, unrectified, renders the deed incapable in a Court of law of passing the property for the purposes of the disentailing deed and resettlement.

There is no case that has been found where a slip in the disentailing portion of a deed which, if unrectified, would prevent it from being an effective disentailing assurance, has been found by the Court since the passing of this statute. There are three cases, however, which have been cited and which it is necessary to discuss.

(1) (1801) 2 Bos. & P. 560. (2) (1801) 2 Bos. & P. 578.

(3) (1772) 2 Bos. & P. 580, n.

In *Hall-Dare v. Hall-Dare* (1) a disentailing and a resettlement had been effected in one deed, and there was a mistake in the resettlement portion which did not affect the validity of the disentailing portion. An application was made to rectify the mistake, and the Court of Appeal, consisting of three very eminent judges, held, reversing the judgment of Bacon V.-C., that it ought to be rectified. It is only right to say that in the Court below counsel for the plaintiff, who was asking for rectification, said that if in that case the document had been defective as a disentailing deed the plaintiff could not have come to the Court. In the Court of Appeal the same counsel argued that s. 47 did not touch the case at all, because the claim was to rectify not a disposition of land by a tenant in tail within the meaning of s. 47, but a mistake in a document of resettlement. The defendant submitted the contrary, and the three judges in the Court of Appeal, although it is perfectly true that their decision only in fact ordered a rectification of that portion of the enrolled deed which effected the resettlement, expressed themselves one and all in language which I find it impossible to treat as consistent with an intention to hold that the rectification permissible was confined to the resettlement portion of the deed and did not equally apply to the disentailing assurance. In fact I do not think it is going too far to say that in giving judgment they did not accede to the view that as the mistake was only in the resettlement portion of the deed it was therefore unnecessary to consider s. 47. It is true that in one sense their remarks are obiter, because it cannot be denied that the operation of the judgment was to rectify the resettlement part of the deed only and not to disturb the language in which the actual disentailing assurance was couched; but although obiter in that sense I find it quite impossible to believe that the learned judges who expressed themselves as they did had any doubt as to the application of their views to the deed as a whole. Lord Halsbury, after referring to the fact that all parties intended to execute and did execute the resettlement in the full belief that it carried out their instructions, said, referring to s. 47 (2): "The Act of Parliament has not in express terms excluded the jurisdiction of the Court to rectify instruments on the ground of mistake. It provides a different mode of barring

(1) 31 Ch. D. 251.

(2) 31 Ch. D. 257.



ASTBURY J. estates tail, and has provided that in future the particular instrument to be enrolled shall be the instrument containing the legal dispositions of the parties, and by which alone the rights of the parties are to be determined. So express is the enactment that the Legislature, having before it the knowledge that the Court of Chancery had thought right to give effect to other documents than proper legal instruments, goes out of its way to exclude the jurisdiction of the Court with regard to supplying and remedying defective executions of powers and other matters, and contains express provisions, the effect of which is that the effect of the instrument and the rights of the parties shall be determined by the instrument which has been enrolled, and that there shall be no other instrument outside the enrolled deed which shall affect the legal dispositions made by the tenant in tail." And a little further on he says (1): "The Legislature, having before it the jurisdiction of the Court of Chancery to rectify deeds, and by sect. 47, excluding, as it does, in terms the jurisdiction to give effect to acts outside, or deeds outside and beyond the particular instrument, has provided what shall be the mode by which the transaction of barring an estate tail can be effected, but has omitted any reference to the well-known power of rectification. It must, therefore, have been intended to leave this jurisdiction unaffected." I cannot conceive how language can be plainer than that, that the power of rectification is not touched by s. 47, and that it does not come within the prohibition against supplying defects in the execution of powers, which is a different and well-known branch of equity jurisdiction. Lindley L.J. said (1): "If it had been intended by the Act to deprive the Court of the power of rectification, it ought to have been so stated in words which could not be mistaken." I cannot see any question as to the meaning of that sentence. Then the learned judge continues: "The same observation appears to apply to cases where, by mistake or accident, a deed is executed and enrolled in a form which was not intended. . . . Looking at the language of sect. 47, it appears to have been directed to a different class of cases altogether. If the Legislature had meant to make a deed when enrolled unalterable there would be something in the argument as to the words 'act or deed,' but I cannot find any such intention in the Act. The object of the Act

(1) 31 Ch. D. 258,

was to change the form of conveyance; and it being inconvenient that an enrolled document should have different effects at law or in equity, the section goes on to say in substance that the enrolled deed shall not be affected by equitable doctrines. That section assumes, however, that the document enrolled represented the intention of the parties when they executed it, and was the deed which they intended to execute." Pausing there for a moment, I think, as Mr. Russell has argued, that an imperfect deed which as such is the deed of the parties and an imperfect deed which as such is not the deed of the parties are two different things. The section, as it appears to me, is dealing with imperfect documents and assurances which are as such the deeds of the parties to them, and, according to the view as I find it expressed in *Hall-Dare v. Hall-Dare* (1), the section is not dealing with documents which are imperfect in the sense that in their imperfect form they are not the deeds of the parties to them at all. That, I think, is the meaning of Lindley L.J.'s language. Then he proceeds (2): "The deed when altered will really be the deed of the parties, and there is nothing to exclude the jurisdiction of the Court to rectify the deed so as to make it conform to their intentions." I understand that means this, that rectifying a deed so as to make it the true act of the parties is clearly not specific performance within the meaning of s. 47, and, secondly, that it is not supplying a defect in the execution of the power under the Act, which refers, as I have said, to a well-known practice of the Court of treating a document which is, in fact, defective as operative under the circumstances. Further, rectification does not seem to me to be the "supplying" under any circumstances "of the want of execution of such power." The parties either did or did not execute the assurance within the meaning of this statute. In this case they did execute the assurance and the Court is not asked to supply any non-execution. Lastly, the fourth head under this section is "And in regard to giving effect in any other manner to any act or deed by a tenant in tail which in a Court of law would not be an effectual disposition." I am not asked in my judgment to give effect in any other manner to any act or deed of a tenant in tail which would not be effectual to pass the estate in a Court of law, which is not a disposition within the meaning

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(1) 31 Ch. D. 251.

(2) 31 Ch. D. 259.

ASTBURY J. of the Act. Then Fry L.J., whose judgment is of extreme impor-

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tance having regard to the fact that he was a party to the decision which I propose to deal with in a moment, after referring to the fact that at the time when the Act was passed the Common Law Courts exercised large powers of rectifying the records of fines and recoveries, said (1) : " Then the new mode of disentailing by deed and consent, with a particular provision for evidencing by deed both the disposition and the consent of the protector of the settlement, puts the deed in the category of deeds which before the Act were in the power of the Court of Chancery to rectify." Stopping there for a moment, I cannot doubt what the learned judge intended by those words. It seems to me that he says in explicit terms that when disentailing could only be effected by fines and recoveries recorded in Courts of common law full powers of rectification were possessed by the Court in which the records were kept, and that when a new method, namely, a deed, was adopted as an alternative, that deed was to be for all purposes, except such as are expressly prohibited, within the jurisdiction of the Court which specially dealt with documents of that character. A well-known jurisdiction which has been exercised for many generations ought not to be lightly treated as being excluded by words in respect of which there is an ambiguity. Then Fry L.J. says (2) : Sect. 47 " no doubt excludes the jurisdiction of equity in certain cases which are therein specified. Of these it is noteworthy that the first is specific performance ; next comes defective execution of powers." Then a little further down he says : " It appears to one, therefore, that rectification was not excluded by sect. 47. I cannot but observe that if the Legislature had meant to touch the jurisdiction to rectify, one would expect to find it mentioned in the same manner that specific performance is. But not a word is said about it. In my judgment the scope of the Act is to make the enrolled deed conclusive, but it would be monstrous and highly unjust to say that the instrument on parchment is to be conclusive of the rights of the parties for all time, however great the mistake or blunder, and however clear the evidence of it. On the other hand if the deed is capable of amendment, it is most beneficial that it should be conclusive of the rights of the parties, so that it is the only instrument to which the parties

(1) 31 Ch. D. 259.

(2) 31 Ch. D. 260.

need have recourse. Whether reformed or not it alone must be looked to." I have read these judgments more than once and can only conclude that all the three judges who took part in them did intend to hold absolutely and in terms that the equitable jurisdiction of rectification was not prejudiced or excluded by the provisions of s. 47. Whether obiter or not, these are opinions which in the absence of definite decision to the contrary I feel myself incapable of disregarding.

The only other English case which seems to be relevant on this point is that of *Bankes v. Small*. (1) Here again the actual decision has nothing to do with the question that I have to determine. A tenant in tail in remainder barred his estate without the consent of the protector and afterwards conveyed his estate and interest to a purchaser, covenanting that he would at the request of the purchaser execute every such disentailing or other assurance as might be necessary to vest in him the premises. The protector died, the purchaser applied to the vendor to enlarge the base fee, and it was held by the Court of Appeal that s. 47 of the Act does not interfere with the jurisdiction of the Court to decree as against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the Court from treating the contract as being in equity a disposition taking effect under the Act so as to bind the issue in tail and the remaindermen. The question under s. 47 was raised at the request of the Court. [His Lordship then read several passages from the judgment of Cotton L.J. (2), concluding with the following (3): "The introductory words 'In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof,' shew that the section only applies where there has been an attempt by a tenant in tail to dispose of land under the Act. It does not deal with the case of a mere contract to execute a disposition under the Act, but deals only with a deed intended to be operative under the Act, but which from some defect is not so operative." And on the next page (4): "In my opinion on the mere construction of that section, having regard to the law that existed before the Act both with

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(1) 36 Ch. D. 716.

(2) 36 Ch. D. 722.

(3) 36 Ch. D. 723.

(4) 36 Ch. D. 724.



ASTBURY J. regard to contracts to suffer recoveries and with regard to giving effect to defective executions of powers, the section does not take away the jurisdiction of a Court of Equity to compel a tenant in tail to do what he has agreed to do," and proceeded :] The only decision that can be found in that judgment is that s. 47 has not deprived the Court of Equity of power to decree specific performance of contracts to disentail. Fry L.J. comes to the same conclusion and he says (1) : " This language appears to me to indicate an intention not to exclude jurisdiction in respect of contracts generally, not to interfere with the law or the equity relating to contracts, but only to provide that no disposition by a tenant in tail resting in contract shall have any force either at law or in equity under the Act." Then he goes on : " We find that the jurisdiction of Courts of Equity is excluded in respect of four subject-matters of jurisdiction ; first, in respect of specific performance of contracts ; secondly, in respect of supplying defects in execution of powers ;"—in which expression I feel satisfied that the learned judge did not intend to include rectification, as his judgment in *Hall-Dare v. Hall-Dare* (2) was before him and was not referred to by him—" thirdly, in supplying want of execution of powers ; and fourthly, in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector which in a Court of law would not be an effectual consent or disposition under the Act." Then he says (3) : " But it appears to me to be clear that if the Legislature had been minded to take away the jurisdiction of Courts of Equity to enforce contracts entered into by tenants in tail, that they would thereafter bar the estate tail, very different language from that which is used in this section would have been used." Very much the same as he said in the earlier case, that if it had been intended to take away the well-known jurisdiction of rectification the statute would have said so. Up to this point there does not seem to me to be anything in *Bankes v. Small* (4) in conflict with the judgments in *Hall-Dare v. Hall-Dare* (2), but there is a passage of Fry L.J.'s judgment which it is said is inconsistent with what he said in that case. I do not so read it. It is as follows (3) : " I have come therefore to the conclusion that the true meaning of this section is to exclude all juris-

(1) 36 Ch. D. 729.

(2) 31 Ch. D. 251.

(3) 36 Ch. D. 730.

(4) 36 Ch. D. 716.

diction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution or non-execution of powers, or on any other ground, an assurance intended to operate under the Act which is not effectual under the Act." I think what the learned judge meant there was that you cannot relieve against the defective execution or the non-execution of a power to disentail which you have not exercised, nor on any other ground can the Court of Equity treat as effectual under the Act an assurance which as such is not so, referring, that is, to deeds which are imperfect as such and which as such are the deeds of the parties and not to deeds which having regard to accidental imperfection are not, unless and until rectified, the deeds of the parties at all. So much for the only two decisions that have been found in this country relevant to this question.

But there is a decision of Wylie J. in the Irish Courts which, although not binding on me, is deserving of every respect. It is *In re Otley's Estate* (1), and the learned judge expressed the view, although he did not base his judgment upon it, that the judgments in *Hall-Dare v. Hall-Dare* (2) should be qualified in the way contended for by counsel for the defendant in this case. He says (3): "Now, reading those judgments apart from the particular facts of the case, they would seem to decide that, notwithstanding section 47 of the Fines and Recoveries Act, the Court has the same power to rectify a disentailing deed so as to make it conform to the intention of the parties as in the case of any other deed. But in reading and applying those judgments, it seems to me that we must have regard to the nature of the rectification applied for and granted in that case, which was, to insert in the deed limitations to the second and other sons of the tenant for life which had by mistake been omitted before the limitations over to collaterals. And what distinguishes that case from the present case is, that the amendment in that case had no effect upon the deed as a disentailing assurance. It was an effective disentailing deed, whether the rectification applied for was granted or not; but here the amendment applied for is for the very purpose of changing the deed, which at present, it is assumed, does not bar the entail, into an effective disentailing assurance. In a later case of

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(1) [1910] 1 I. R. 1.

(2) 31 Ch. D. 251.

(3) [1910] 1 I. R. 8.

ASTBURY J. *Bankes v. Small* (1), where an action was brought to compel a  
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 tenant in tail to execute a disentailing deed pursuant to his contract, the effect of section 47 was again discussed, and Fry L.J. says"—and then he reads the passage that I have just read, and continues: "Now, comparing this statement of Fry L.J. with the observations I have quoted from his judgment in *Hall-Dare v. Hall-Dare* (2), it seems to me to shew that when the Court of Appeal laid down broadly in that case that the power of a Court of Equity to rectify a deed was not affected by the 47th section in the case of a disentailing deed, they had not present to their minds such a rectification in the form of a deed as would change a non-effective into an effective disentailing assurance." I am unable to come to the same conclusion as Wylie J. did. I have no reason to suppose that the learned judges who took part in *Hall-Dare v. Hall-Dare* (2) were not perfectly capable of appreciating the full extent and meaning of the language which they so decidedly made use of, and I am unable to believe that if the judges who decided *Bankes v. Small* (1), to whom *Hall-Dare v. Hall-Dare* (2) had been cited, had intended to express themselves in a way which was inconsistent with the judgments in that case they would not have said so in plain terms. I cannot believe that Fry L.J. can have intended indirectly and ambiguously to overrule his own previous expression of opinion.

I therefore come to the conclusion, so far as the Act is concerned, that I am not prohibited by s. 47 from directing the rectification which the plaintiff seeks.

The second point which has been taken is that if I have jurisdiction to rectify this document I ought not to exercise it against the defendant the second daughter of Mr. Bertram Meeking, on the ground that she was not a party to the transaction in question, but claims by title paramount per formam doni. For that proposition *Attorney-General v. Day* (3) and *Hinton v. Hinton* (4) and cases of that character have been cited. Lord Hardwicke in the latter case said: "It is truly said, that if a man, seised of an estate tail with or without remainder over, contracts for sale, and receives the purchase money, and dies in the first case without levying a fine, or without a recovery in the last case, this Court would not carry

(1) 36 Ch. D. 716.

(3) 1 Ves. Sen. 218.

(2) 31 Ch. D. 251.

(4) 2 Ves. Sen. 631, 634.

into execution against the issue in tail; . . . but the ground of that is, the issue in tail in the one case or remainderman in the other claim per formam doni from the creator or author of the estate tail, and therefore though in the power of tenant in tail to be barred by a particular conveyance, that not being done, the Court cannot take away that right they derive not from the tenant in tail but from the author." I do not think that that applies to rectification at all. Rectification is only made on the ground that the inaccurately expressed document, which was executed as an assurance, is not in its inaccurate form the deed of the parties at all, and if a proper case is made out on the evidence, and I think it is obviously made out here, the duty of the Court is to put the document in the form in which it must be, in order for it to be and remain the deed of the parties to it. Miss Meeking, the defendant, is not quite in the same position as the issue in the case of *Hinton v. Hinton*. (1) This disentailing assurance was part of a marriage contract, and for all I know the marriage might never have taken place if the disentailing and resettlement had not been arranged for and carried out, and however that may be, it does not seem to me that the reasoning of *Hinton v. Hinton* (1) applies to rectification at all, and I think it has been amply made out in the present case that the transaction was based on the obvious intention to make an effective disentailing assurance and resettlement, and that none of the parties to the present case are in a position to either contest this or prevent rectification being decreed.

That being so, the relief claimed by the plaintiff must be granted.

Solicitors : *Pontifex, Pitt & Johnson*.

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NOTE.—Sects. 7 and 8 provide that in certain cases fines and recoveries, notwithstanding errors of names or parcels in the record or proceedings, shall be valid without amendment, and s. 9 provides that nothing in the Act shall lessen or take away the jurisdiction of any Court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by the Act.

Sect. 15: "After December 31, 1833, every actual tenant in tail . . . shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming

(1) 2 Ves. Sen. 631.

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ASTBURY J. the lands entailed by force of any estate tail which shall be vested in or  
 1916 might be claimed by . . . the person making the disposition, at the  
 MEEKING time of his making the same, and also as against all persons . . .  
 v. whose estates are to take effect after the determination or in defeasance  
 MEEKING. of any such estate tail . . . .”

Sect. 40: “Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute; provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this Act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act, notwithstanding such disposition shall be made or evidenced by deed; . . . .”

Sect. 41: “Provided always, that no assurance by which any disposition of lands shall be effected under this Act by a tenant in tail thereof . . . . shall have any operation under this Act unless it be inrolled in His Majesty’s High Court of Chancery within six calendar months after the execution thereof; . . . .”

Sect. 47: “In cases of dispositions of lands under this Act by tenants in tail thereof . . . . the jurisdiction of Courts of Equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution . . . . of the powers of disposition given by this Act to tenants in tail, . . . . and the supplying under any circumstances of the want of execution of such powers of disposition . . . . , and in regard to giving effect in any other manner to any act or deed by a tenant in tail . . . . which in a Court of law would not be an effectual disposition . . . . under this Act; and that no disposition of lands under this Act by a tenant in tail thereof in equity . . . . shall be of any force unless such disposition . . . . would, in case of an estate tail at law be an effectual disposition . . . . under this Act in a Court of law.”

J. R. B.

*In re* WALMSLEY AND SHAW'S CONTRACT.

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*Vendor and Purchaser — Contract — Construction — Meaning of “et cetera” — Easement — Right of Way — Form of Conveyance — Exclusion of Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6.*

A contract for the sale of two plots of land, “and buildings material, &c.,” omitted any mention of a right of way thereto. The premises were described by reference to a plan, and formed part of a larger property belonging to the vendor and bounded on the north by a public high road. A farm cart track led from this high road across a field of the vendor, past the larger of the two plots sold, to the smaller plot. This cart track had been used by the former tenants of certain cottages on the smaller plot to carry coals and furniture, &c., thereto, but it was always so used by permission of the vendor or her predecessors. A public footpath ran close to the side of the cart track up to the smaller plot. The purchaser claimed to have inserted in the conveyance of the property an express grant of a right of way for all purposes along the cart track, or to have included in the conveyance such words as would carry the right to use the same.

Upon a summons by the vendor to have the rights of the parties determined and the form of the conveyance settled by the judge:—

*Held*, upon the construction of the contract, that the words “et cetera” referred to “material,” and were limited to something of the same character and did not carry the right of way; but if the words could be extended to include property of the same nature and character as “land and buildings,” the most they could be held to include would be rights appurtenant to land and buildings.

*Held*, further, that the contract was one for the sale of the premises with such rights of way only as were legally appendant or appurtenant thereto, and that the right of way claimed, not being appurtenant to the land and buildings, or a way of necessity, did not pass.

*Held*, therefore, in the result, that the purchaser was not entitled to any express grant of the right of way, and the conveyance should also contain a proviso excluding the operation of the 6th section of the Conveyancing Act, 1881.

*Bolton v. Bolton* (1879) 11 Ch. D. 968 and *In re Peck and London School Board* [1893] 2 Ch. 315 followed.

THE vendor, Mary Ann Walmsley, was the owner in fee simple of certain freehold property at Huby, in the parish of Harewood, in the county of York. The purchaser, John Sheffield Shaw, was

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the owner of property bounding the vendor's property on the west, and he was tenant to the vendor of the two plots of land which were the subject of the agreement for purchase.

By an agreement dated May 17, 1915, "Mrs. Walmsley agrees to sell, and Mr. Shaw agrees to buy the following land and buildings, material, &c., for the sum of three hundred and seventy-five pounds." The premises sold and the boundaries were then described in the contract by reference to a plan, but no mention was made of any right of way. The larger of the two plots sold contained 3939 square yards, and the smaller, situated a short distance to the south, contained 985 square yards; both formed part of the larger property of which the vendor was owner in fee. The smaller plot was some distance from the public highway called the Harrogate Old Road, which bounded the vendor's property on the north. On this plot were an old cottage, an orchard, and two other ruined cottages, and some debris. There was no means of access to the south. From the north there was a public footpath leading from the Harrogate Old Road over and along the western side of the vendor's land, past the eastern side of the larger plot sold, and continuing up to the smaller plot. Close to the path was a farm cart track across the field of the vendor, also leading to the smaller plot. This track had never been used as a public roadway for horses, carts, or other vehicles, but the persons formerly occupying the smaller plot had used it by permission of the vendor or her predecessors to bring coals, furniture, and building materials to the cottages. By one of his requisitions on title the purchaser required to have a formal grant of a right of road along the cart track to the smaller plot. To this the vendor's solicitor replied that the contract did not provide for that. A further requisition was made that the vendor was bound to provide a proper means of access to the land sold, to which the reply was made that the purchaser could obtain that access through his own land which bounded it, and also through that which he was purchasing. A draft conveyance which was forwarded for approval to the vendor's solicitors was framed so as to convey the said pieces of land "together with all and every the appurtenances thereto belonging, or enjoyed therewith." It also contained an express grant of a right of way for all purposes connected with the use of the premises, with horses, carts, or wagons,

over the specified part of the vendor's property, from the Harrogate Old Road to the smaller plot. The draft was finally altered on behalf of the vendor by cutting out the grant of the right of way and inserting, after the description of the plots, these words: "together with all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and appurtenances whatsoever appertaining or appurtenant thereto"; and also by inserting a proviso after the habendum to the effect that the operation of s. 6 of the Conveyancing Act, 1881, was excluded from the conveyance. The purchaser insisted upon his requisitions.

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On March 15, 1916, a summons under the Vendor and Purchaser Act was taken out by the vendor asking for declarations (1.) that the respondent was not entitled to have inserted in the conveyance to him any express grant of any right of way over the property of the applicant; (2.) that the operation of s. 6 of the Conveyancing Act, 1881, must be excluded from the conveyance, so far as it would (if not excluded) confer any such right of way upon the respondent; and (3.) that the form of the conveyance relating to this matter might be settled by the judge.

In her affidavit the vendor alleged that it would be detrimental to the property which she retained if a permanent right of way for horses, carts, or vehicles was granted, and that if the conveyance was framed so as not to exclude s. 6 of the Conveyancing Act, 1881, such a perpetual right of way over the track in question would pass by the conveyance.

*A. Adams*, for the vendor. The legal position is clear. It is a mere contract for the sale of land, with no mention of any right of way. No grant of any right of way can be inserted in the conveyance, unless it is a way of necessity. The case comes within the decisions in *In re Peck and London School Board* (1) and *Bolton v. Bolton*. (2) In the latter case there was a contract for the sale of land "with the appurtenances," and those words were held not to pass a right of way to the land sold which the vendor had used over his own adjoining land. The law on the subject is stated in

(1) [1893] 2 Ch. 315.

(2) 11 Ch. D. 968, 970.



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Williams' Vendor and Purchaser, 2nd ed. vol. i. p. 639. The case of *Barkshire v. Grubb* (1) is distinguishable and was discussed in *In re Peck and London School Board*. (2) *International Tea Stores Co. v. Hobbs* (3) shows the effect of inserting general words in a deed and the necessity for the exclusion of s. 6 of the Conveyancing Act, 1881. Further, this is not a way of necessity without which the property could not be used at all. "Ways of necessity" are used in contrast with other expressions, such as "easements which are necessary to the reasonable enjoyment of the property granted," and the word "necessity" has a narrower meaning than "necessary": *Union Lighterage Co. v. London Graving Dock Co.* (4)

*Percy Wheeler*, for the purchaser. There was a made track here over the vendor's own land to the old cottages on the smaller plot, and it is the only convenient way to approach these buildings. A purchaser expects to obtain the means of approach to his purchase. Upon the construction of the contract, the words "et cetera" are used in connection with "land and buildings" and are sufficient to carry any rights analogous to those described in general words: *Parker v. Taswell* (5); *Cooper v. Hood*. (6) It is said this is not a way of necessity because the purchaser was the owner of land to the west and it would be physically possible for him to obtain access to the smaller plot. But a portion of that land is a swamp, and the cart track is the natural means of access. The case comes within the decision of *Barkshire v. Grubb* (1), where there was a gravelled path leading to a highway, and Fry J. said that the ordinary general words would have carried the right to this path. So also in *Bayley v. Great Western Ry. Co.* (7) Fry J. made a similar statement that general words would carry a right of way, which in that case was a visible private road. In the present case there is a visible road. It is a mere accident that the purchaser is the owner of adjoining property. No case has decided that under circumstances such as exist here a defined visible track at the date of the contract would not pass. In *Nicholls v. Nicholls* (8) Stirling J. said that under the general words which would have been inserted a "formed

(1) (1881) 18 Ch. D. 616.

(2) [1893] 2 Ch. 315.

(3) [1903] 2 Ch. 165.

(4) [1902] 2 Ch. 557, 573.

(5) (1858) 2 De G. & J. 559.

(6) (1858) 26 Beav. 292.

(7) (1884) 26 Ch. D. 434.

(8) (1900) 81 L. T. 811.

road " would have passed. There will be no hardship to the vendor, and the purchaser is entitled to have the conveyance drawn in such a form as will give him this right.

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EVE J. I think the contention of the vendor is right in this case. On the land sold lay the bricks and other debris of two cottages which had fallen to pieces, and on the true construction of the contract I think the words "et cetera" are limited to the word "material" which immediately precedes them and refer to something of the same character as "material." But if that is not the true construction to be placed on those words and their operation is to be extended so as to include property of the same nature or character as land and buildings, the most I think that they could be held to include would be rights appurtenant to the land and buildings. But the right of way here claimed cannot be said to be appurtenant to the land and buildings sold. It is a right of way which the vendor has used to the premises sold over adjoining land of her own, and in his judgment in *Bolton v. Bolton* (1) Fry J., speaking of two roads over each of which a right of way was there claimed by the purchaser, said: "In my opinion neither of the ways was either appurtenant or appendant. The common words 'with all ways thereunto appertaining,' strictly and properly speaking, never carry a right of way over another tenement of the grantor; and for this simple reason: when a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking." So that, upon either construction of the contract, the expression "et cetera" cannot be held to include the right of way now in dispute. In these circumstances, and in the absence of any mention of this right of way, what was the subject-matter of the contract? That question I answer by again referring to the judgment of Fry J. in *Bolton v. Bolton* (1), where he says in the paragraph immediately before that which I have already read: "The contract for the sale of the property does not contain any words with regard to the right of way. In my view, therefore, the contract was for the conveyance of the premises with all that

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was appurtenant or appendant to them and nothing more." I think it is the same here—a contract for the sale of these premises with such rights of way only as were legally appendant or appurtenant to them. At the date of this contract it is not accurate to say that the road over which the right of way is claimed was either the sole means of access to these premises or a road made up for the use of the occupiers thereof. The only habitable cottage was in a tumbled-down condition and unoccupied; from time immemorial it and the other cottages, when existing, had been approached on foot by the pathway leading from the high road, but from time to time the tenants had been allowed to cart across the field of the vendor coals, building materials, furniture, and such other things as could be more conveniently transported by carts, but that privilege was always exercised by permission of the vendor and her predecessors. In this state of things, how can the purchaser rightfully claim to have an express grant made to him of this right of way, or to have included in the conveyance such words as will carry the right to use the same? Mr. Wheeler, for the purchaser, has relied upon the cases of *Barkshire v. Grubb* (1) and *Bayley v. Great Western Ry. Co.* (2) These cases, as it appears to me, were sufficiently dealt with by Chitty J. in *In re Peck and London School Board* (3) to show that they do not really help the purchaser here; and all I need point out is that in both of those cases there was an element present which is not present here—namely, in the one a clearly defined gravelled path and in the other a private way constructed and used in both instances for the purposes of the property in respect of which the claim to have the use continued was being made. When a property with a particular mode of access apparently and actually constructed as a means of access to it is contracted to be sold the strong presumption is that the means of access is included in the sale. But here the facts fall short of the condition of things existing in either of those cases. The road over which the right is claimed is a farm cart track across a field used for all the necessary purposes of the farm, but not a made road, nor in any sense constructed as a means of access to the property contracted to be sold. In my opinion

(1) 18 Ch. D. 616.

(2) 26 Ch. D. 434.

(3) [1893] 2 Ch. 315.

the case falls within the decisions of *Bolton v. Bolton* (1) and *In re Peck and London School Board* (2), and I see no reason for holding that the purchaser is entitled to any such express grant as he asks for. It is also, I think, clear, on the authorities, that it is a case for the exclusion of s. 6 of the Conveyancing Act, 1881, and the form which the conveyance should take is that in which the draft was last settled on behalf of the vendor. That will give effect to the judgment I have pronounced. The purchaser must pay the costs.

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Solicitors: *Jaques & Co., for Watson, Son & Smith, Bradford;*  
*Hamblins, Grammer & Hamlin, for Wade & Kitson, Leeds.*

G. M.

### DYSON v. PEAT.

[1915 D. 1229.]

EVE J.  
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*Lien—Principal and Agent—Indemnity for Damage—Colliery—Subsidence—Equitable Lien—Possible Future Claims.*

Where an agent has acted for his principal in working a colliery and so rendered himself liable to future claims for damage by surface owners, and moneys have subsequently come into his hands outside his agency but as trustee for his principal, the agent is not entitled, either upon principle or authority, to any equitable lien upon such moneys to answer possible future claims, where no liability has yet accrued and no cause of action by surface owners has yet arisen.

#### MOTION FOR JUDGMENT.

The plaintiffs were the trustees, and the plaintiff Alice Beatrice Dyson the surviving executrix, of the will of Thomas Crawford, who died in 1887, and they claimed a declaration that the defendant, Sir William Peat, as their agent, held the proceeds of sale of the machinery and plant of a colliery as part of the personal estate of their testator, and payment of the same to them. The defendant claimed to retain these moneys in his hands as an indemnity against possible liability arising from his working of the colliery.

(1) 11 Ch. D. 968.

(2) [1893] 2 Ch. 315.



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By a lease dated January 27, 1887, the Ecclesiastical Commissioners for England granted to the testator a lease of certain seams of coal lying under 973 acres of Crossgate Moor, in the county of Durham, for a term of thirty years from September 28, 1884, at the rents and royalties therein mentioned. The grantors were not the owners of the surface of the land mentioned in the lease, but it contained a covenant on the part of the lessee, his executors, administrators, and assigns, with the owner or owners, occupier or occupiers, for the time being of the surface, to pay compensation for all damage occasioned by the lessee in working the seams of coal thereby demised.

By his will, dated May 28, 1887, T. Crawford bequeathed this colliery, called the "Elvet Colliery," to his trustees, upon trust to raise certain sums for his sons and their children, and he bequeathed the ultimate residue of his real and personal estate to his seven daughters absolutely.

On November 18, 1896, the premises comprised in the lease were assigned by the trustees and executors of T. Crawford to the Elvet Colliery Company, Limited (a company formed to work the colliery), for the residue of the term granted by the lease, in consideration of 12,600*l.*, and the company covenanted to indemnify the trustees of the testator's will against the rent and covenants of the lease. In January, 1906, there was a serious subsidence of the surface above the mine worked by the company, and numerous claims for compensation for damage were made by owners and occupiers of houses on the surface against the company and the plaintiffs, some of which claims were finally adjudicated upon in *Dyson v. Forster*, *Dyson v. Seed*, *Quinn*, *Morgan*, and *Others* (1), and damages were given to the claimants.

By a debenture dated April 11, 1907, the company, at the request of the plaintiff A. B. Dyson, charged its undertaking and all its property and assets as a security for the performance of the covenant of indemnity contained in the assignment of November 18, 1896. By the third condition of this debenture it was provided that, if there should be a breach of the covenant of indemnity, A. B. Dyson might, after giving notice in writing to the company, appoint a receiver and manager of the company's business, who

(1) [1909] A. C. 98.

should have power to sell the same as a going concern. On July 4, 1907, A. B. Dyson, in exercise of this power, appointed the defendant receiver and manager of the company's business, and he took possession thereof and worked the colliery until July 25, 1907. On that day a resolution was passed for the voluntary winding up of the company, and the defendant was appointed liquidator. He carried on the business of the company, pursuant to orders of the Court, until January 25, 1908, when he ceased to work the colliery, and sold the plant, machinery, and other assets for 4442*l.* After satisfying the amount of damages recovered in actions and making other disbursements, the defendant admitted, by letter of April 21, 1914, that a sum of 2286*l.* was then in his hands as receiver on behalf of the debenture-holder. The liquidator was discharged on September 13, 1909.

On February 19, 1909, an action against the plaintiffs was commenced by some of the beneficiaries under the will of Thomas Crawford for the administration of his estate, and an administration order was made and certain inquiries directed. By the Master's certificate, filed July 8, 1912, it was certified that the residuary estate of the testator included a sum of 2317*l.* in the hands of the defendant as receiver and liquidator of the Elvet Colliery Company, Limited, the proceeds of sale of machinery and plant, out of which he claimed to be indemnified in respect of claims for damage while he worked the colliery as liquidator. It was alleged in the statement of claim that the working of the colliery by the defendant was limited to four acres of grazing land on which no buildings stood, or had since been erected; that the only seam worked by the defendant was at a depth of 198 feet, and nearly eight years had elapsed without any subsidence; and that the possibility of damage by subsidence was remote. The plaintiffs therefore claimed payment from the defendant of 2286*l.* or the investments representing the same, and any other property representing assets of the colliery received by him as such agent.

The defendant admitted the material facts as to the colliery on which the plaintiffs relied, but stated that the surface of the area of the colliery worked by the defendant might thereafter be built upon, and in that event there was a probability of a subsidence of the surface occurring, and of claims being made against the

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EVE J. defendant. He only desired a sufficient and satisfactory indemnity, and subject to that was willing to deliver up the funds. The matter came before the Court upon a motion for judgment on admissions, and the question was one of law whether the defendant had any lien upon the moneys in his hands.

*Maugham, K.C.*, and *St. John Clerke*, for the plaintiffs. Sir W. Peat having been appointed receiver out of Court is not an officer of the Court, but merely the agent of his principal who appointed him: *Owen & Co. v. Cronk*. (1) No other principle than that of principal and agent is involved. The agent does not incur any personal liability; he is entitled to be indemnified by his principal. The defendant cannot maintain his claim to either a particular or general lien at common law. His claim, if any, must be for an equitable lien. That can only be justified by establishing that he was a trustee. The actual moneys upon which he claims his lien have come quite fortuitously into his hands. *Bertrand v. Davies* (2) shows the high-water mark of a claim of this character. If such a claim as this were allowed it would amount to the holding up of estates for an indefinite time against liabilities that might never arise.

*Clayton, K.C.*, and *R. H. Hodge*, for the defendant. The case of *Darley Main Colliery Co. v. Mitchell* (3) went a step further than the earlier case of *Backhouse v. Bonomi*. (4) It dealt with a second subsidence. There was no tort in the original excavation of the colliery. But a cause of action would arise if there should be future damage. It is conceded that the agent is entitled to a personal indemnity against his principal for damages incurred in the performance of his agency, and to a lien for any damages actually paid. The question is whether there is any lien in respect of a liability which may or may not arise. We say the defendant has such an equitable lien. The right to an indemnity exists not only in respect of payments actually made by an agent, but also in respect of a liability which may ripen into a debt. *Hammonds v. Barclay* (5) shows the principle which governs the present case.

No right arises until the damage is caused, but the lien exists,

(1) [1895] 1 Q. B. 265.

(2) (1862) 31 Beav. 429.

(3) (1886) 11 App. Cas. 127.

(4) (1858) E. B. & E. 622;

(1861) 9 H. L. C. 503.

(5) (1802) 2 East, 227, 235.

and an agent is entitled to be indemnified against liability as well as loss : *Lacey v. Hill, Crowley's Claim*. (1) Liability, and not payment, is the principle applied in that case. The plaintiffs assert that the possible damages are remote and negligible. Our contention is that the right to indemnity is ancillary to the lien, and the lien is one applicable to any liability which may arise in future.

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EVE J. The relationship established between Mrs. Dyson and the defendant by the appointment of July 4, 1907, was that of principal and agent; if authority is wanted for that statement it is to be found in the case of *Owen & Co. v. Cronk*. (2) It is not suggested that the defendant acted otherwise than within his authority, or was guilty of any negligence in working the colliery, and the plaintiffs do not deny that he is entitled to be indemnified by them against any claims which may hereafter be made against him for damages to the surface arising out of his working of the coal. All that is conceded. But the defendant, who by virtue of his position as liquidator in the voluntary winding up of the colliery company has become possessed of moneys for which he is accountable to the plaintiffs,—proceeds of sale of the plant, machinery, and chattels of the company covered by the plaintiffs' security—claims the right to retain these moneys as an indemnity fund against any such possible claim for damage as I have suggested. It is to be observed that these moneys do not represent proceeds of the working carried on by the defendant as Mrs. Dyson's agent, but are, in substance, moneys of which the defendant is possessed as trustee for her and her co-plaintiff. From that it follows that if his claim to retain these moneys is well founded, he would, a fortiori, have been entitled to retain any moneys coming to him as the direct result of his discharging his duties as Mrs. Dyson's agent. The question is, Can an agent successfully assert such a lien as the defendant is here claiming?

In the case of *Hammonds v. Barclay* (3), cited by Mr. Clayton in the course of argument, there happens to be in the judgment of Grose J. a definition of a lien which it is convenient to quote. He says: "A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the

(1) (1874) L. R. 18 Eq. 182.

(2) [1895] 1 Q. B. 265.

(3) 2 East, 227, 235.



EVE J. person in possession are satisfied." It is clear that no liability has yet accrued here, and it is admitted that no cause of action on the part of any surface owner has yet arisen. There has been no payment made by the defendant on behalf of the plaintiffs, no demand has been made upon him, and so far as is known there is no liability ripening against him. In these circumstances it is impossible to suggest that he has any lien at law. Has he then any equitable lien? I am of opinion that he has not either upon principle or authority. If any principle existed under which a lien could be asserted in cases of this sort it would lead to very extraordinary results.

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A receiver appointed by a mortgagee to execute work of this nature, involving the excavation of strata underlying the earth's surface, always runs some risk, however careful he may be in performing his duties, and his operations are calculated to create a state of things which at some distant date may give rise to a cause of action. Why then, if he is entitled to assert a lien on his receipts for any possible future claim which may be made against him, should he part with a single halfpenny of his receipts? He would certainly have a better claim to assert a lien on these than on other moneys of his principal which have reached his hands from another source and are not the fruit of his work as agent. But the result of holding him entitled to assert such a lien over his receipts would be to paralyse his activities as the principal's agent and, in a case like the present where the main and practical object of his appointment is the getting and marketing of the coal, would be destructive of the advantages intended to be secured by the appointment. When this is once realized it is not to be wondered at that no authority has been produced in support of the defendant's claim. In my opinion it cannot be sustained, and I must declare that the defendant is not entitled to retain, as against the plaintiffs, any part of these investments, and that the plaintiffs are entitled to have them transferred into their names.

As the plaintiffs do not press for costs there will be no order as to these.

Solicitors: *Van Sandau & Co., for Belk, Cochrane & Belk, Middlesbrough; William A. Crump & Son.*

G. M.

## HILL v. SETTLE.

[1916 H. 598.]

EVE J.

1916

Nov. 16.

*Bankruptcy—Undischarged Bankrupt—Intervention by Trustee—Action commenced by Bankrupt—Application by Defendant to stay—Withdrawal of Intervention—Costs.*

A trustee in bankruptcy who has intervened in regard to after-acquired property of an undischarged bankrupt can withdraw his intervention.

The plaintiff had become bankrupt in 1908 and was undischarged. In 1913 he entered into partnership with the defendant. In 1915 his trustee gave notice to the defendant to pay him any moneys then or thereafter due to the plaintiff from the defendant. In March, 1916, the plaintiff commenced an action for an account and payment of moneys due under the partnership. On July 7 the defendant gave notice of application for stay of proceedings till the trustee became a party. On July 31 the trustee gave notice of withdrawal of the notice of 1915:—

*Held*, that the notice of 1915 was an intervention by the trustee; that it could be withdrawn; that it had been withdrawn by the notice of July 31, 1916; that the intervention was to be treated as determined as from the date of the notice of 1915; but that the defendant was entitled to costs of the application down to and including July 31.

JOHN ROBERT HILL was adjudicated bankrupt on December 19, 1908, and was undischarged. By an indenture of July 21, 1913, he entered into partnership with Victor Alfred Settle as physicians and surgeons. By a verbal agreement of September, 1913, V. A. Settle agreed to carry on the partnership alone and to apply J. R. Hill's share of profits for his benefit. On October 26, 1915, the trustee in the bankruptcy wrote to V. A. Settle as follows: "I beg to give you notice that I require payment to be made by you to me of all monies which may now and hereafter be and become due from you to the bankrupt, on the ground that he has not obtained his discharge." V. A. Settle informed J. R. Hill that he had received the notice. In March, 1916, J. R. Hill commenced an action against V. A. Settle for an account of the partnership and payment of moneys due and damages for breach of the indenture and agreement, and a statement of claim was delivered. On July 7 V. A. Settle gave notice of application to stay all

EVE J. further proceedings till the trustee was added as a party; alternatively, that J. R. Hill should give security for costs. The application was adjourned into Court. On July 31 the trustee wrote to V. A. Settle's solicitor that, "as there were disputes between the parties as to the facts and he had no knowledge of what the real facts or position was, he was advised that his proper course was to withdraw the notice he gave to Dr. Settle on October 26, 1915, and he withdrew such notice accordingly." The application now came on for hearing.

*Haydon*, for the applicant. After-acquired property of a bankrupt vests in a trustee who has intervened, by virtue not of the intervention but of the bankruptcy law: *Cohen v. Mitchell* (1); Bankruptcy Act, 1914, s. 38 (a), s. 53, sub-s. 2; *In re Rogers*. (2) A trustee who has intervened cannot withdraw his intervention: *Ex parte Carter*. (3) The question of his right to withdraw has never been actually decided: *Affleck v. Hammond* (4), where Kennedy L.J. intimated his view that he could withdraw. Intervention having taken place, no subsequent change of mind can divest the property or displace the intervention. The action is not maintainable as constituted. The alternative courses are that the action be stayed—*Jackson v. North Eastern Ry. Co.* (5)—or the trustee added as a plaintiff: *Emden v. Carte*. (6) The only course open to the applicant is to ask to have the action stayed.

*Crossfield*, for the bankrupt. An undischarged bankrupt has a right to carry on an action unless and until the trustee intervenes: *Buchan v. Hill*. (7) It may be difficult to say what constitutes intervention: *Crickitt v. Crickitt*. (8) "In all cases in which intervention is allowed in a pending action, the intervener should apply to be made a defendant": Annual Practice, 1917, p. 222. *In re Rogers* (9) was a real case of intervention, being an application by the trustee. Here the trustee has not intervened, but merely given a notice. He has taken no steps whatever. But

(1) (1890) 25 Q. B. D. 262.

(2) [1894] 1 Q. B. 425.

(3) (1876) 2 Ch. D. 806.

(4) [1912] 3 K. B. 162.

(5) (1887) 5 Ch. D. 844.

(6) (1881) 17 Ch. D. 169.

(7) [1888] W. N. 233.

(8) [1902] P. 177.

(9) [1894] 1 Q. B. 425.

even if the notice was an intervention, it could be and has been withdrawn. There is no known case in law in which a notice cannot be withdrawn. This was an ordinary notice, and, according to Kennedy L.J. in *Affleck v. Hammond* (1), it is clear it could be withdrawn. The withdrawal makes the original notice null and void.

*Haydon* in reply. "The moment the assignee gave notice of the claim to the appellant the debt vested in him, and no subsequent bargain could enable the bankrupt to sustain a debtor's summons which was taken out at the time when the debt was so vested in the assignee": per James L.J. in *Ex parte Carter*. (2) That is conclusive of the fact of intervention. When property once vests in the trustee it becomes divisible among the creditors, and it would be impolitic to allow him to change his mind.

EVE J. By this action, commenced on March 15, 1916, the plaintiff seeks to recover certain moneys alleged to be due to him by virtue of two contracts, one an indenture of partnership dated July 21, 1913, and the other a supplemental verbal agreement come to in September, 1913. The defendant now applies for a stay of all further proceedings in the action on the grounds that the plaintiff is and was in March, 1916, and for eight years prior thereto had been an undischarged bankrupt, and that before the issue of the writ the trustee in the bankruptcy had interfered or intervened, and by asserting his title to any moneys owing to the plaintiff under the contracts had disqualified the plaintiff from giving a valid receipt for such moneys and from maintaining any action to recover the same. The first question to be determined is, Did the trustee intervene in such a way as to bring about these results? In my opinion he did. The position of the trustee as to these moneys, which represented after-acquired property of the bankrupt, was that he might either claim them as assets vested in him as trustee, or he might, if he thought fit, allow the bankrupt to receive and use them for his own purposes just as if he were free from the disadvantages of being an undischarged bankrupt. A trustee who adopts the latter course runs the risk of being called upon to justify his conduct by his *cestuis que trust*, the creditors

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(1) [1912] 3 K. B. 174.

(2) 2 Ch. D. 810.



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of the bankrupt, and this no doubt is an important factor in determining his course of conduct. When he has once made it clear that it is his intention to intervene and to assert his paramount title to the property the bankrupt is disqualified from giving a valid receipt for and from maintaining an action to recover such property. So long as the trustee's intention is unmistakably manifested it is, in my opinion, immaterial how it is manifested, and in this case I hold that the notice of October, 1915, constituted an effectual interference or intervention by the trustee and disqualified the bankrupt from instituting this action or giving a valid receipt for the moneys claimed in the writ.

The disqualification subsisting when the action was commenced was still subsisting when notice of this application was given, and had matters remained as they then were I should have made the order asked for by the defendant, but in the interim the trustee has written to the defendant's solicitor purporting to abandon the position he took up in October, 1915, and to withdraw the notice he then gave. This attitude gives rise to two further questions—the one whether a trustee who has once intervened in relation to after-acquired property can determine his intervention, and the other whether—assuming he can determine it at all—he can determine it as from a date antecedent to his notice of determination. I think he can do both. Inasmuch as it rested with him to determine in the first instance whether he should or should not intervene and to choose the moment for intervention if he decided on intervention, I cannot myself see any reason why he should not have the same discretion in determining whether or no the intervention ought to be persisted in or whether it ought ever to have been made. Facts coming to his knowledge subsequent to the intervention may satisfy him that his intervention was from the first a mistake, or he may be able to make such terms with the bankrupt as to future earnings as may make a continuance of the intervention less in the interests of his *cestuis que* trust than its determination. I think in either case he has a power to put an end to the intervention, and when it comes to a question of date from which the intervention is to be treated as determined I think the discretionary power vested in him in this respect must at least be as wide as the discretion he possesses in fixing upon the date to intervene.

The result is that in this case, in the events which have happened, the bankrupt is in the same position as he would have been if no notice of intervention had ever been given. The defendant's application was justified by the condition of things existing when it was launched, and the costs of the application down to and including July 31, when the trustee withdrew his notice, will be the defendant's in any event. The subsequent costs will be costs in the action.

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Solicitors: *Redpath, Marshall & Holdsworth, for R. F. Payne, Sheffield; Aldous & Co., for Richardson & Mitchell, Sheffield.*

A. L.

## ENLAYDE, LIMITED v. ROBERTS.

SARGANT J.

[1915 E. 1226.]

1916

Nov. 8, 9.

*Landlord and Tenant—Covenant to insure against "loss or damage by fire"—Insurance against Fire except when caused by "Foreign Enemy"—Alleged Custom as to such Insurance being a Compliance with the Covenant.*

In a lease granted by R. in 1913, the lessee covenanted to repay R. the sums expended by R. in insuring the demised property against "loss or damage by fire"; to keep the property in repair "except in case of destruction or damage by fire"; and at the expiration of the lease to give up to the lessor, "damage by fire excepted," the demised property in good repair. R. covenanted at all times during the term to insure and keep insured the demised property "against loss or damage by fire in some insurance office of repute" in a named sum, and further that, in the case of destruction of or damage to the demised premises by fire, she would "lay out all moneys received in respect of such insurance in rebuilding or reinstating . . . the premises so destroyed or damaged, and in case such moneys" should "be insufficient for such purpose, she" would "make good such insufficiency out of her own moneys." A policy of insurance against fire was effected in the names of the freeholders, R., and the lessee of R. in an office of repute whose policies, including the one in the present case, exempted the office from liability for "loss or damage by or happening through" certain events, including "invasion, foreign enemy," and "military or usurped power." In 1915 the demised property was destroyed by fire caused by incendiary bombs dropped by enemy aircraft. The Court was satisfied

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that, although policies of insurance against fire issued by offices of repute always exempted the offices from liability for fires caused by military operation, their exemption clauses differed considerably in other respects:—

*Held*, that the words “loss or damage by fire” must be construed in their strict and primary and not in any secondary sense, and that the lessor was liable under her covenant for the loss which had occurred.

Proposition II. in Wigram’s *Extrinsic Evidence in Aid of the Interpretation of Wills*, 3rd ed. p. 17, approved and applied to the construction of documents other than wills.

At the date of the lease below referred to Elizabeth G. Roberts (the defendant in the present action) was the lessee for a term of years of a factory in the eastern part of England. By an indenture of lease dated September 27, 1913, E. G. Roberts sub-demised the factory for a term of about forty-eight years to one Burton at a rent of 100*l.* a year, and there was also reserved an additional rent of all sums of money which the defendant might expend in insuring and keeping insured the demised premises “from loss or damage by fire as hereinafter mentioned.” The lessee then covenanted to pay the rent and also to repay to the lessor the sums paid by her “in insuring and keeping insured the said demised premises against loss or damage by fire.” Then followed a covenant by the lessee to keep the property in repair, “except in case of destruction or damage by fire,” and covenants that the lessee would, at the expiration of the lease, give up to the lessor, “damage by fire excepted,” the demised premises in good repair, and that the lessee would not do anything whereby “the policy of insurance” against loss or damage by fire might be invalidated. The defendant, the lessor, on the other hand, covenanted with Burton, his executors, administrators, and assigns, that she (the lessor) would, at all times during the term, insure and keep insured the demised premises “against loss or damage by fire in some insurance office of repute, to be selected by the lessor, in the sum of 3000*l.* at the least,” and further that, in the case of destruction of or damage to the demised premises, or any part thereof, by fire, the lessor would, “with all convenient speed, spend and lay out all moneys received in respect of such insurance in rebuilding or reinstating in a good and substantial manner the premises so destroyed or damaged, and in case such moneys shall be insufficient for such purpose she will make good such insufficiency out of her own moneys.”

Burton afterwards assigned the lease to the plaintiffs, after the written consent of the lessor to the assignment had been obtained. The defendant insured the property against fire in the Sun Insurance Office in the sum of 3000*l*. The insurance policy was in the joint names of the freehold reversioners of the defendant's lease, the defendant herself, and Burton, and expressly stated that it was not to cover "loss or damage by or happening through earthquakes, invasion, foreign enemy, riot, civil commotion, or military or usurped power," or "loss or damage by explosion." After the beginning of the war with Germany the freeholders insured the property in their own names only with Lloyd's against damage by enemy aircraft, and early in 1915, after this insurance had been effected, the property was destroyed by fire caused by incendiary bombs dropped by enemy aircraft. As the property was insured against fire, the Government refused to pay the plaintiffs anything in respect of the damage. Lloyd's paid the freeholders the amount insured with them, but subject to the stipulation that they should be subrogated to the rights of the freeholders against those claiming under them; and it was stated that an action was pending by the freeholders against the plaintiffs and defendant in the present action to recover possession of the property on the ground of breach of covenants in the lease and sub-lease. In their statement of claim in the present action the plaintiffs alleged that the defendant in breach of her covenant had failed to insure the demised premises against loss or damage by fire, or, alternatively, had failed to effect such an insurance as covered the loss or damage "by the fire which in fact happened." They alleged, further, or in the alternative, that if the defendant did in fact insure against loss or damage by fire, she had failed to lay out any of the insurance money in reinstating the premises, and had repudiated all liability in respect of the damage by fire, and had claimed that the plaintiffs, under their covenant, were liable to make good the damage; and they claimed a declaration that they were under no liability to make good the damage, and also claimed damages for the breach by the defendant of her own covenant. The defendant pleaded that "the said fire was caused by the discharge of incendiary bombs from hostile aircraft." She admitted that she had failed to effect such an insurance as would cover loss or damage by the fire which in fact happened, but contended that such a failure

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SARGANT J. was not a breach of her covenant to insure. She also said that the demised property at all material times was insured and kept insured by her against fire, within the true meaning of her covenant, by a policy approved of by the plaintiffs, but that no money had been received by her in respect of such insurance. The defendant, in her pleading, also said : " It is a usual and well-known custom in all fire policies to exclude risks caused by the acts of foreign enemies, and the said custom was well known to the plaintiffs." At the trial the defendant tendered and gave evidence (which was admitted *de bene esse*) to show that in all offices of repute it was usual in fire policies to exempt the companies from liability in respect of fires occurring from causes of the kind now under consideration, and that the policies in many cases contained words similar to those in the Sun Office's policy.

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*A. Grant, K.C., and Joshua Scholefield, for the plaintiffs.* Loss or damage by fire to the demised property has undoubtedly occurred, and that is what the defendant has covenanted to insure against, and she has not so insured. She has only insured against certain kinds of loss or damage by fire excepting, amongst other things, " loss or damage by or happening through . . . invasion, foreign enemy, . . . or military or usurped power." Assuming that fire caused by incendiary bombs dropped by enemy aircraft is within the exception, that is no concern of the plaintiffs. The Court has to construe the defendant's covenant and not the policy actually effected. There has been loss or damage by fire within the plain meaning of that covenant, which has not been observed by the defendant, and she must either pay damages for the breach of it, or, what comes to the same thing, reinstate the property as required by the second part of her covenant. The defendant does not say that it was impossible to insure against damage by Zeppelin raids, the danger from which was well known before the fire occurred, but only that no office of repute would grant a policy which would cover fires caused by a foreign enemy. That might be so at the time when the lease was granted, but that time is not the one which the Court has to consider. Before the fire occurred it was possible, as the facts of this case show, to insure with Lloyd's against damage caused by enemy aircraft.

[*Romer, K.C.* Lloyd's is not an insurance office.]

The onus lies on the defendant to show that her covenant is not to be construed according to the plain and ordinary meaning of its words.

*Romer, K.C.*, and *Foà*, for the defendant. The defendant's covenant must be read in the light of the knowledge possessed by the parties at the time when the lease was granted, and it only extends to losses or damage by fires such as were then in contemplation and were then usually insured against in policies granted by offices of repute. No dictionary definition governs this particular case. *Prima facie*, no doubt, the covenant must be construed according to its literal meaning; but although "when the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words," yet "extrinsic evidence is admissible for the purpose of determining the literal meaning of the words": *Norton on Deeds*, p. 56; *Shore v. Wilson*. (1) It has always been an exception, or rather a corollary, to the general rule that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; and such investigation of necessity takes place where terms of art or science occur in mercantile contracts, and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member and in which he passed his life: *ibid.*; *Norton on Deeds*, pp. 60, 61. In the case of every lease containing a covenant to insure against fire the covenant has been considered to have been performed by taking out such a policy as was effected with the Sun Office. The word "fire" in every such policy has a meaning to arrive at which custom must be regarded. It was in fact impossible at the time when the lease was executed to obtain an unqualified insurance against fire in any office

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(1) (1842) 9 Cl. & F. 355, 525, 527.

SARGANT J. of repute. What was the basis of the decision in *Yuill & Co. v.*

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*Robson* (1)—namely, the fact that the risk would naturally be present to the minds of the parties to the contract—is entirely absent in the present case. That case also seems to show that the plaintiffs, by being parties to the Sun policy, are estopped from saying that it did not comply with the covenant. An agent employed to effect an insurance for his principal is only bound to have inserted in the policy all the ordinary risks and chances which are usual and proper: *Story on Agency*, 9th ed., par. 191, p. 220. The known usages of trade and business often become the true exponents of the nature and extent of an implied authority: *Story on Agency*, 9th ed. par. 96, p. 108. And the same principle applies to contracts which are not of agency. Where no specific directions are given as to the form of policy, an agent is justified in insuring in an office whose policies contain exemptions from liability in case of certain events happening: *Moore v. Mourgue* (2); *Duer's Marine Insurance*, vol. ii. p. 229. War risks are universally excepted from the events for which insurance offices are to be liable, and “loss or damage by fire” must be read in the same secondary sense throughout the lease. Where an event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened: *Baily v. De Crespigny*. (3)

*A. Grant* in reply. The defendant has not by her evidence displaced the onus which lay upon her.

[SARGANT J. Does not proposition II. in *Wigram's Extrinsic Evidence in Aid of the Interpretation of Wills*, 3rd ed. p. 17, apply to a document like this as well as to wills? The learned Vice-Chancellor there says: “Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of con-

(1) [1907] 1 K. B. 685; [1908] 1 K. B. 270.

(2) (1776) 2 Cowp. 479.

(3) (1869) L. R. 4 Q. B. 180, 185.

struction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." (1)]

We accept that proposition in its entirety. As regards the defence of custom, that cannot prevail unless the alleged custom is both reasonable and certain. The custom set up here is not certain, as policies of different offices of repute differ considerably in their exemption clauses. Because some particular office has policies which contain an exemption clause in a certain form, you cannot say that a covenant to insure which does not expressly refer to that or any other office is to be construed by reference to the usage of that or any other office. Where all offices differ in their exemption clauses there cannot be said to be certainty of custom or usage.

SARGANT J. In this case I have to decide who, under the terms of a sub-lease granted by the original lessee from the freeholder, is liable for loss or damage by fire caused by incendiary bombs dropped from enemy aircraft.

The position of the damaged property need not be more closely indicated than by saying that it is on the eastern side of the kingdom, and the damage was done in May, 1915, prior to the institution of the Government scheme of insurance. The circumstances under which it will or may be necessary to adjust the liability between the defendant, who is the original lessee, and the plaintiffs, who are the assigns of her sub-lessee, are very extraordinary. The freeholders, who themselves have a covenant from the defendant to insure against fire, early in the year 1915, when the dangers from new methods of warfare introduced by the Germans became apparent, insured their freehold estate—which consisted of some nine or ten acres covered by buildings and let on leases granted by them, including the lessor's (the defendant's) lease—with Lloyd's against damage by enemy aircraft. But although, as I understand, the full rate of insurance was paid as on the total value of the buildings, the freeholders did not take the precaution to insert in the policy the name of their own

(1) As to the value of the 3rd ed. of the book of Sir James Wigram, see *In re Grainger* [1900] 2 Ch. 756, 763.



SARGANT J. lessee (the defendant) or the names of the sub-lessees. Of course I attach no blame to the freeholders for this omission.

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The sub-lessees, who were in occupation of the property, insured the contents of the building against similar damage, and, when the Government Commission or Committee was instituted to make good claims in respect of damages by enemy aircraft, the sub-lessees were compensated, under the Government's voluntary scheme, in respect of the contents of the building, but no payment was claimed from or made by the Government in respect of the building because there was this existing insurance with Lloyd's.

Lloyd's have admitted their liabilities to the freeholders, and have paid to them the amount in which they insured their property ; but they have made, as a condition of that payment, a claim (which I think was not expected by the public) that they should be subrogated to the position of the freeholders and left entitled to enforce against those claiming under them—in this case the defendant and the plaintiffs—such rights to damages for breach of covenant as the freeholders themselves had ; and an action is now pending in which, as I understand it, the underwriters, in the names of the freeholders, or using their names, are seeking to recover from the defendant in the present action the amount for which she, under her covenant with the freeholders, is said to be liable in respect of this damage by fire. Accordingly it may become necessary to determine, as between the defendant (the original lessee) and the plaintiffs (the sub-lessees), how any liability that may be enforced against the defendant will have to be adjusted between the parties to this action.

There was some discussion as to whether it would be better that the present action should stand over until the action by the underwriters in the names of the freeholders had been disposed of. The parties thought it more convenient—and I concurred with them—that I should determine, as between them, the question of liability, as depending on the construction of the lease, and then give liberty to apply, if necessary, after the trial of the other action, so that the question may be reduced to one of pounds, shillings, and pence.

I should add that, since it was discovered that the lessee, and possibly the sub-lessees, might be held liable to the freeholders, or

to the underwriters in their name, in respect of this claim. application has been made to the Government to consider the position of the persons interested in the building other than the freeholders, but that to that application an answer has been returned that the Committee has been dissolved and that no claim can be ascertained. I am extremely sorry that this should be so, because it seems to me that persons in these circumstances are entirely within the spirit or principle of the compensation which the Government thought fit to adopt in respect of raids which occurred at a time when the dangers of this method of warfare had not been appreciated and there was no easy method of insuring against it.

I will not say anything more about that, or about the question between the freeholders, or the underwriters in their names, and the parties to the present action, because that question is entirely sub judice. But I have taken the opportunity of saying what I have said because I think it is exceedingly important that the public should realize quite fully, what seems not to have been hitherto generally understood, that it is not necessarily sufficient that one person interested in a building should insure against aircraft risk unless it is quite clear that that person is the person upon whom the ultimate liabilities rest.

I should like to add this. What view the Government take as regards their obligations under their scheme of insurance I do not know. But inasmuch as the premium paid is, in every case, I think, based upon the full freehold value of the buildings and is not diminished in any way because the party paying the premium happens to have an interest which is far smaller than the full value of the property, by reason of his rent being a secured rent or his having some right of indemnity under covenant or otherwise, I should hope that the Government would, under their scheme, adopt a more generous view of the situation, in case of a mistake being made as to the person in whose name an insurance has been effected, than has apparently been adopted by the insurers in the present case. Having regard to the great difficulties which may arise in other cases, as in the present one, in determining on whose shoulders the Court should fix the liability as between the freeholder, the lessees, the sub-lessees, and so on, it would be extremely regrettable if, although the full premium had been paid, some of the parties interested were not protected

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SARGANT J. because the insured persons did not include the person ultimately liable.

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I will now proceed to consider what is the true effect of the present lease. [His Lordship read the underlease down to and including the *reddendum* as an additional rent of the amount of the insurance premiums, and continued :] Then, not only is that payment reserved as a rent, but the lessee covenants to repay the lessor any amount which she may expend in pursuance of her covenant to insure the premises “against loss or damage by fire.” After this comes the general covenant by the sub-lessee to keep the property in repair and so on, and in that covenant there is the exception “except in case of destruction or damage by fire.” The expression occurs for the fourth time in the sub-lessee’s covenant that he will at the expiration of the term leave, surrender, and yield up the property “damage by fire excepted.” The sub-lessee also covenants not to “do or suffer to be done in or upon the said premises anything whereby the policy of insurance of the said premises against loss or damage by fire may be invalidated.”

Then comes the covenant round which the argument has principally raged. [His Lordship read the defendant’s covenant to insure against, and reinstate the property in case of, loss or damage by fire, and continued :] The insurance with the Sun Office was, as a matter of fact, effected by the freeholders, but in the names of themselves, the lessee, and the sub-lessees, and the policy exempted the insurers from liability in case of damage by fire caused by military operations, to put it shortly, and therefore exempted them from liability for the particular damage that has in fact occurred.

The plaintiffs say that “loss or damage by fire” has occurred ; that they are not concerned with the proximate, or immediate, or any cause of the fire ; that under the plain terms of the sub-lease the defendant had to insure against that loss or damage ; and that she has to make good any deficiency required to reinstate the property. The plaintiffs rely—as they are entitled to do—upon the plain rule of construction which is laid down as regards wills by Wigram V.-C. in his well-known book on *Extrinsic Evidence in Aid of the Interpretation of Wills* (proposition II., 3rd ed. p. 17), and which is applicable to all contracts, that where there is nothing to show that the parties have used language in any other than its strict

and ordinary sense, and where the words interpreted in that sense are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words shall be interpreted in that strict and primary sense and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

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The defendant, the lessor, has tendered and given evidence for the purpose of showing that it is usual amongst all offices of repute in this kingdom to except, in their policies of insurance against fire, fires arising from causes of this kind, and accordingly she says that one must read the words "insure and keep insured the said demised factory and premises against loss or damage by fire in some insurance office of repute" as being a covenant "to insure and keep insured the factory and premises against loss or damage by fire otherwise than fire caused by causes which are usually excepted in insurance policies granted by offices of repute." Then the defendant says that, having put that construction on the words "loss or damage by fire" with that one exception, you must put the same meaning on the expression in every other place where it occurs in the document; and accordingly that, where the document contains the further words "in case of destruction of or damage to the said premises or any part thereof by fire," you must read those words as meaning "in case of destruction of or damage to the said premises or any part thereof by fire other than fire caused by causes which are usually excepted in policies of insurance granted by offices of repute," and that therefore in the event which has happened the defendant has not made default in effecting such an insurance as she covenanted to effect, and that the event on which she was liable to make good the deficiency out of her own moneys has not arisen. That is the argument on behalf of the defendant as far as I can make it out.

In my judgment, this evidence was not admissible, and there is nothing to show that the parties were contracting in such a way as to use those words "loss or damage by fire" in any other than their strict and primary sense, or with any reference at all to any custom obtaining amongst all or any insurance offices. But I thought it more convenient that I should hear the evidence *de bene esse*, and, having heard it, I have come to the conclusion that, even if the



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A good many policies have been produced to me, and it is quite clear that in their general nature, in the general description of the loss or damage against which they effect insurance, they are very much alike. They all except fire caused by military operations ; but I do not think that that is enough. I think that if persons are seeking to show that words are used in some sense other than their strict and primary sense, that is to say, in some secondary sense, they must establish clearly what that secondary sense is. Here it is quite clear, looking at all the forms of policy that have been produced and having regard to the evidence that there were similar variations in other policies which have not been produced, that there may be many cases of fire which are provided for and insured against by some of these policies which are not provided for and insured against by other policies. Not only do the expressions in different policies vary, but the substance of the policies seems to vary to an appreciable extent. I see that in two of the policies "fire caused by subterranean fires" is excluded. There seems also to be a considerable difference as to the liability in case of explosion of boilers or gas. And, without following it out into any great detail, I think that there is no such settled practice as would enable me to attach to the plain words of the covenant any satisfactory definite secondary sense.

The cases cited to me on behalf of the defendant seem to be really very much in favour of the plaintiffs. In one of them, *Ywill & Co. v. Robson* (1), the Court refused to construe a contract to insure made by persons who were not in the insurance world in the way in which it might perhaps be construed by persons whose business was that of insurers. So here I think it would be wrong to construe a document like the one now before me, made between an ordinary lessor and ordinary lessees, having no special knowledge of insurance practice, in the way in which it might be perfectly well understood by persons conversant with insurance practice and dealing on that market.

The apprehension which appears to be entertained by one or two

(1) [1907] 1 K. B. 685 ; [1908] 1 K. B. 270.

insurance brokers who have been called before me, that a decision adverse to their construction may expose them to liability when, on instructions of clients, they insure on their behalf against fire, does not seem to me to have any real foundation. It may very well be that when the principal directs the agent to insure against fire on the London market the agent will have sufficiently discharged his functions if he has insured in one or other of the usual offices in a form usual among insurance offices. It is quite a different thing to say that in a contract of this kind, between a lessor and lessees, I have to construe the liabilities and obligations of the parties by any such rule.

It is curious that the question should have arisen in a case where it is the lessor who undertakes liability as to damage by fire, because it is familiar knowledge to all of us that as a rule it is the lessee who undertakes such a liability. While I recognize the general principle of construction as laid down in the passage in the book of Wigram V.-C., I should like to say how I construe this particular document. I am not at all sure that it is necessary to construe the words "loss or damage by fire," even in the insurance part of the defendant's covenant, in any other than its strict and natural sense. I look upon that part of the covenant as showing that the lessor accepts the liability to make good any loss or damage by fire, while under other parts of the document the lessee has to undertake the liability to make good any loss or damage not caused by fire, and that then the lessee desires to have some warranty or guarantee, some reasonable assurance, that the lessor would be able to meet the heavy obligation which would fall on the lessor in case a fire occurred. That being so, the lessor, in order to secure the performance of the liability to the reasonable satisfaction of the lessee, agrees to insure in some office, but that obligation is only one which is ancillary to the obligation of the lessor to make good the damage by fire by reinstating the demised premises. If the lessor is insufficiently insured, then she is to make good any deficiency out of her own pocket, and I think that is the main obligation which I have to deal with in construing the lease between the parties.

I look upon the lessor's covenant as being one by which she accepts the responsibility of making good any loss or damage by fire, and agrees to insure for the purpose of making it reasonably certain that

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SARGANT J. she will have funds out of which she will discharge that liability. If  
1916 that is so, it may be, although I do not say that it is the case, that the  
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LIMITED by insuring against loss or damage by fire to the extent to which  
v. she actually did insure. I do not think that that is the right con-  
ROBERTS. struction, but even if it were, it would by no means follow that the  
lessor would not be liable to make good, out of her own pocket, any  
amount which was not provided for in the result by the insurance  
which was actually effected.

Here the whole liability has arisen in circumstances and from causes  
which were not in the least in the contemplation of either party ;  
but I do not think that, in order that the liability of the covenantor  
should be established, it is necessary to go as far as Channell J.  
actually went in *Ywill & Co. v. Robson* (1) when he held that the  
cause or the event was in the contemplation of the parties. In my  
judgment, it is quite sufficient for a plaintiff to establish that the  
words used cover the event in question whether the parties did or did  
not in fact apply their minds to that event ; and the defendant here  
necessarily fails unless she establishes that the words were used in  
a definite limited or secondary sense which does not cover the actual  
event.

In the result, therefore, I declare that, as between the parties to  
this action, the liability for the loss which has occurred through the  
fire falls on the defendant and not on the plaintiffs, and I give liberty  
to apply as to how the amount is to be adjusted, and give the plaintiffs  
the costs of the action.

Solicitors for plaintiffs : *Milner & Bickford.*

Solicitors for defendant : *Withers, Pollock & Crow.*

(1) [1907] 1 K. B. 685 ; [1908] 1 K. B. 270.

F. E.

*In re* BEDE STEAM SHIPPING COMPANY, LIMITED.

[1916 B. 527.]

*Company — Transfer of Shares—Registration — Limited Power for Directors to refuse to register Transfer—Arbitrary Exercise of Power—Rectification of Register—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32.*

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A power for directors to refuse to register transfers of shares if "in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof" only justifies a refusal to register upon grounds personal to the proposed transferee. It does not justify refusal to register transfers of single shares or shares in small numbers because the directors do not think it desirable to increase the number of shareholders, or because they think that the transfer is not bona fide, but that the transferee is the mere nominee of the transferor, and the transfer is made to increase the number of shareholders who will support him in a policy which the directors disapprove:—

So *held* by Lord Cozens-Hardy M.R. and Warrington L.J., affirming the decision of Eve J. and approving the judgment of Chitty J. in *In re Bell Brothers* (1891) 65 L. T. 245. Dissentiente Scrutton L.J.

THIS was a motion by B. S. Elder and A. K. Lewis under s. 32 of the Companies (Consolidation) Act, 1908, for the rectification of the register of the Bede Steam Shipping Company, Limited, by inserting the name of A. K. Lewis in the place of B. S. Elder as the holder of a fully-paid ordinary share in the company which B. S. Elder had sold and transferred to A. K. Lewis but the transfer of which the directors had refused to register.

The company had been registered in July, 1900, with a capital of 30,000*l.* divided into 3000 shares of 10*l.* each. The total issued capital was 240 preference shares and 1360 ordinary shares. The company was a public company, but had been formed to carry on the business of Frew, Elder & Co., a private firm of steamship managers of Newcastle-upon-Tyne. Article 82 of the articles of association provided that "the person or persons constituting the firm of Frew, Elder & Co. shall be and continue directors and managers of the company so long as they or the survivors or survivor of them shall be capable or willing to act."

In 1902 Andrew Frew, one of the firm, died, and the business of



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the company was carried on by his widow, Mrs. Frew, and her three sons, the said B. S. Elder, Edward Elder, and J. A. Frew. In September, 1915, Mrs. Frew died ; she had held 578 shares in the company. Her three sons continued to act as directors of the company. A family quarrel arose between B. S. Elder and his brother and half-brother about their mother's will and as to the policy to be pursued in the management of the company. B. S. Elder had raised the point that, as the firm of Frew, Elder & Co. had ceased to exist, therefore there were no proper directors of the company. He had also threatened to proceed to wind up the company.

In January, 1916, B. S. Elder sold two fully-paid ordinary shares, one to the said A. K. Lewis, who was a clerk in the office of the clerk of the peace for the county of Durham, in which office B. S. Elder was also employed, and the other to Miss Sisterton, who was house-keeper in the house in which B. S. Elder lived, but not in his employment. B. S. Elder executed transfers of these shares and sent them in for registration.

J. A. Frew wrote a letter to the applicant, B. S. Elder, in which, after saying that he had seen the transfers, he proceeded : " I must state that in the opinion of myself and Mr. Edward Elder it is contrary to the interests of a company such as this, which is really a family concern, that the shares should be transferred singly or in small lots to outside persons having no interest in, or knowledge of, shipping. It is contrary to the past policy of the company ; the only holders of single shares are two of the persons who signed the memorandum and articles of association for the purpose of making up the necessary numbers."

B. S. Elder answered that the only way in which the registration of a transfer could be declined was for the directors to certify that " it is contrary to the interests of the company that the proposed transferee should be a member thereof," and that the board could only decline on grounds personal to the transferee, and not because of the number of shares involved. To this J. A. Frew answered : " The point is that unless some stand is taken on the principle itself, we might be placed in the position of having numerous members who can be of no service to the company holding single shares, so that their membership would be a positive disadvantage, not only on account of the extra expense which the secretarial and other work

would involve, but as causing more likelihood of differences among members, and increasing the difficulty of management."

A meeting of the board of directors was held at which all three directors were present. There was no discussion relating to the personal position, character, or qualifications of the proposed transferees. B. S. Elder was asked his reasons for transferring the shares, and he said that Lewis was a clever fellow, that he wished to stop "hole in corner" meetings, and that he wished to fill up the vacancy caused by his mother's death by registering another woman in her place, and said he intended to transfer other single shares. A resolution was then passed by the votes of Edward Elder and J. A. Frew that the transfer should not be registered. They signed a certificate that, "in the opinion of the directors and managers, it is contrary to the interests of the company that Arthur K. Lewis, of 25, Hawthorn Terrace, Durham, solicitor's managing clerk, as the proposed transferee from Benjamin S. Elder, of Glen Villa, Cedars West, Sunderland, of one ordinary share in this company, should be a member thereof." They added a postscript: "It is distinctly understood that this certificate does not in the slightest degree reflect upon the personal character or financial standing of the above mentioned transferee." A similar certificate and postscript was given in the case of Miss Sisterton.

At an extraordinary general meeting of the company held on March 2, 1916, a resolution was passed approving the action of the directors. The articles of association affecting the question are set out below. (1)

At an extraordinary general meeting of the company the action of the directors was approved.

The case came before Eve J. on April 7, 14, and 18, 1916. J. A.

(1) Article 22 provided that, "subject to the restrictions of these articles any registered holder of shares may transfer all or any of his shares."

Article 24: "The directors and managers may in their discretion and without assigning any reason therefor refuse to register the transfer of any share (not being a

fully paid up share) to any person of whom they shall not approve as transferee and may decline to register the transfer of any fully paid up share or shares on certifying that in their opinion it is contrary to the interests of the company that the proposed transferee should be a member thereof."

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C. A. Frew was examined and gave the same reasons for the refusal to register as were given in the certificate and in his letters, but added 1916 in re-examination that those were not all the reasons ; the directors thought that the sales of the shares were not bona fide, and that the transferees were really the nominees of the transferor and might take steps prejudicial to the company.

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*Gore-Browne, K.C.*, and *J. M. Lightwood*, for the applicants, and *Maugham, K.C.*, and *H. E. Wright*, for the company, cited the same cases and urged the same arguments as in the Court of Appeal.

EVE J. delivered the following judgment :—Although the particular circumstances of this case are not likely to recur, the occasions are not uncommon on which differences between two contending parties in a corporation are sufficiently acute to create on each side a determination to prevent, if it can, the other side from increasing its strength numerically, or as a voting force, by the multiplication of transfers ; and if, as not infrequently happens, the board of directors espouses the cause of one side, or even if it is itself divided in opinion, and is, in such circumstances, entrusted with, and called upon to exercise, discretionary powers as to passing or refusing to pass transfers, nice points are bound to arise involving the question whether the discretion has been exercised bona fide or arbitrarily and capriciously. These considerations render it necessary, in applying the law to the facts of any particular case, to keep clearly in view the risk of any pronouncement of too general a character or of any attempt to enunciate precise rules of general application. In truth the facts in cases of this class vary very much, and comparatively small variations may become of importance in any attempt to reconcile all that has been said in the reported cases. Here I apprehend I have three points to consider—first, what is the power vested in the directors ; secondly, did they exercise, or purport to exercise, that power ? and, thirdly, was their action bona fide in the interests of the company or arbitrary and capricious ?

The right of transfer being absolute, except in so far as it is restricted by contract inter socios, it is to the articles of association

that we must turn for the purpose of ascertaining the nature and extent of the restrictions imposed. [His Lordship read the part of article 24 set out above.] Although the wording of that article is somewhat unusual, the substance of the restrictions is in my opinion the same as it is in cases where the board are empowered to "decline to register the transfer of any share to a transferee who is not approved by them." In each case it is an implied term of the contract that the refusal to register is the result of a conclusion arrived at bona fide in the interests of the company, and in those interests only. I have now to consider what is the extent, what is the true construction, of such a power, and along what lines directors who set out to exercise such a power ought to travel in order that they may reach a right conclusion. Upon this I have the authority of Chitty J. in *In re Bell Brothers* (1) that in exercising such a power "the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." In considering the question of the transferee's fitness, are they entitled to hold him unfit because they are of opinion that the transfer is being made to him as a trustee for the transferor, or because they disapprove of the transferee being brought into the company solely to increase votes in favour of a particular policy, or because they are apprehensive that his position as a shareholder may enable him to acquire and to pass on to others information as to the company's business, the dissemination of which might be contrary to the interests of the company? I think it is clear that the answer to the first two of these questions must be in the negative, and to the third in the affirmative. In the case of *In re Bell Brothers* (2) Chitty J. lays it down that the power does not justify the directors in rejecting a transfer on the ground that the transferee against whom they entertain no objection is the nominee of some person whom they consider objectionable; and a little further on in his judgment he adds (2): "a power to approve a transferee is confined to the transferee personally. In the exercise of such a power the inquiry of the directors is confined to the transferee himself." It follows, I think, that it is to the transferee, and to his qualifications or disqualifications, as the case may be, and not to the transferor's

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(1) 65 L. T. 245, 246.

(2) 65 L. T. 248.



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and his supposed motives, that the attention of the board must be directed. Nor are the pecuniary qualifications of the transferee the only elements to be considered. It is the duty of the directors to look at all the relevant circumstances in which the transferee is placed. He may be, as has been suggested, the owner of a private business competing with the company, or a person whose presence in the particular company would be resented by the shareholders generally and be calculated to give rise to unpleasantness, or he may even be a person so notoriously litigious as to be unacceptable in any peace-abiding corporation. All these are matters which the directors may properly take into account in exercising their discretion. How far, I now ask myself, did these directors proceed on the foregoing lines? I assume that they had grounds for believing, partly by reason of the names and addresses in the transfers and partly from the fact that the consideration money paid for the share in each case was considerably less than the value which the applicant had himself placed on the share, that the proposed transferee was in each case a nominee of the transferor, and that he was bringing them in to support his views on the policy of the company and the conduct of its business. Beyond that they did not know, and they made no attempt or inquiry to find out, anything as to the fitness of the transferees. As Mr. Frew frankly admitted, "the status of Mr. Lewis and Miss Sisterton"—those are the two transferees—"was not discussed by the board. No reference was made to their pecuniary, social, or other position." On that admission it is impossible to hold that these directors confined their inquiry to the transferees. On the contrary, they deliberately ignored them, and confined their attention to the transferor, satisfied that the transferees were merely to be considered as his nominees and likely to adopt his attitude towards the company. There existed at all material times, and there continues to exist, a deadly quarrel between the applicant and his brother and half-brother; and in the course of that quarrel the applicant wrote letters to his half-brother and brother containing passages which are certainly to be regretted. Among other matters of difference between the parties were many matters relating to the affairs and administration of this company and the question whether or no it ought, in the circumstances, to continue its operations. The applicant is in a minority as to votes;

and in the course of the correspondence his solicitors, in protesting against the course taken by the majority, wrote that it might be found necessary to take steps to wind up the company. I cannot, as counsel for the respondents urges I ought to do, construe that as a threat necessarily hostile to the company, and I am not called upon, or, indeed, in a position, to say which faction in the company is in the right. The applicant has certainly put himself at a disadvantage in the discussion by the tone of some of his letters, but far be it from me to say that a man is necessarily in the wrong because he expresses his opinions with unnecessary warmth. The fact is there is a violent difference as to the best policy to be adopted by the respondent company between the applicant and the other directors. The respondents think the policy of the applicant is inimical to the interests of the company; the applicant, on the other hand, I will assume with perfect honesty, believes that the carrying out of the policy advocated by his co-directors is very undesirable. In those circumstances and in that atmosphere the matter of these transfers came up for decision. As I have already pointed out, no inquiry was made as to the fitness of the transferees; and until a very late stage in Mr. Frew's evidence it appeared, both from the record in the minute-book and from his oral testimony, which substantially agreed with that record, that the transfers were rejected because the majority of the board objected, first, to the slight increase of expenditure in printing and postages which would be incurred if the body of shareholders was numerically increased, and, secondly, to the introduction, as members of the company, of individuals who were neither related to the founder's family nor connected in business with the company. Neither of these grounds could, in my opinion, have justified the rejection by the directors of the transfers, for they in no way touched the fitness of the transferees. But at the end of his re-examination Mr. Frew said: "We did not give all our reasons for coming to the conclusion that it was unwise to pass these transfers; but our reasons were that, in our opinion, the sales were not bona fide, and that the transferees were merely nominees of the transferor; and, taking the surrounding circumstances into consideration, there was some ulterior motive in getting these people as members. Perhaps it was to assist him in his threats, and I consider that against the interests of the company." And then he was asked this question:

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“Was it possible that these nominees might take some step prejudicial to the company?”, and replied: “Yes, I thought they would.” It is certainly a pity, if these last answers disclose additional reasons which really operated in the minds of the deponent and his co-director, who constituted the majority, that they were not stated earlier and included in the record in the minutes. But, assuming that they were in fact part of the reasoning which led to the refusal to register, were they reasons which can properly be relied on for rejecting these transfers under the power vested in the board? I do not think they were. So far as they involved the motives of the transferor and the possibility, or even probability, that the transfers did not evidence any real contracts of sale and purchase, they were, on the authority of the quotations I have made from Chitty J.’s judgment in *In re Bell Brothers* (1), irrelevant; and, so far as they are made up of apprehensions of future trouble, they are founded, on the witness’s own admissions, solely on the motives and attitude of the transferor, and without any inquiry into the position of the transferees, their motives, their attitude, or anything else. How can such a determination be in exercise of a discretionary power to reject transferees as unfit? The fact is the majority decided to reject these transfers on grounds which might, and probably would, have been open to them had the power to reject been an unqualified power, but which were not grounds legitimately available in exercising a power qualified as this one is by reference to the fitness of the transferee. In my opinion, therefore, there was no proper exercise by the directors of the real power vested in them, and it becomes immaterial to consider the question whether they acted bona fide or arbitrarily.

Upon the argument of counsel for the respondents, that any attempted transfer of a single share in a small family company might reasonably be regarded as contrary to the interests of the company and therefore properly to be rejected, I will only add this, that, although there may be grounds for accepting his contention in the case of companies registered as private companies with a strictly limited membership, I do not think it ought to be applied to a company upon which no statutory limit of membership is imposed, even though it be in the nature of a family concern; and even in the

(1) 65 L. T. 248.

case of private companies it seems to me to be a matter which ought to be dealt with expressly in the articles.

In all the circumstances I think the applicant succeeds, and that I ought to direct these transfers to be registered ; and I so do. The company must pay the costs.

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The company appealed. The appeal came on for hearing on October 17, 1916.

*Maugham, K.C.*, and *H. E. Wright*, for the appellants. An order to register the transfer ought not to be made. Under the articles of association the directors had power to refuse to register a transfer of a share to any person of whom they did not approve as transferee on certifying that in their opinion it was contrary to the interests of the company that the proposed transferee should be a member thereof. They have given a certificate to that effect, and it is submitted that that is final. They added that the certificate was not intended to reflect on the personal character or financial position of the transferee, but that did not affect the validity of the certificate. They were acting in good faith and in the best interests of the company, and were bound to consider all the circumstances, including the facts that this was a family company and there were serious family disputes. *Eve J.* followed *In re Bell Brothers* (1), and held that it was the duty of the directors to direct their attention to the transferee only. It is submitted that that decision was wrong and should be overruled : *Ex parte Penney* (2) ; *Moffatt v. Farquhar*. (3) The directors have chosen to tell the Court what their reasons were, so the Court will consider whether they are adequate. That distinguishes this case from *Moffatt v. Farquhar* (3) and from *In re Coalport China Co.* (4)

Since the order was made in this case the applicants have commenced an action in the Chancery Division for a declaration that the present directors are not directors at all. The directors were therefore justified in assuming that the proposed transferees were intended to be mere nominees of Mr. B. S. Elder to increase his voting power which he intended to use for purposes hostile to the company. The

(1) 65 L. T. 245.

(3) (1878) 7 Ch. D. 591.

(2) (1872) L. R. 8 Ch. 446.

(4) [1895] 2 Ch. 404.



C. A. directors are not confined to the reasons given by the minutes if it  
 1916 can be shown that there were other sufficient reasons. The learned  
 BEDE STEAM judge has assumed that the directors acted honestly and in good  
 SHIPPING faith, and if that is so the Court will not interfere with their  
 COMPANY, LIMITED, discretion.  
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*Ward Coldridge, K.C.*, and *J. M. Lightwood*, for the respondents.  
 The directors have interfered with the right of transferees to take shares in the company and of the transferor to exercise his right of property over his shares. That is not within their power. Mr. B. S. Elder says the transferees have given no undertaking to vote as he desires ; the directors have not shown that the transfers were made with any such object ; they have made no objection to the transferees, and indeed have formed no opinion concerning them. They merely say they will not register any transfer of a single share from B. S. Elder. That is not within their power. It is contrary to the case of *In re Coalport China Co.* (1) and to Mellish L.J.'s judgment in *Ex parte Penney*. (2)

*Maugham, K.C.*, in reply.

LORD COZENS-HARDY M.R. This is an appeal from the decision of Eve J. in an application under s. 32 of the Companies (Consolidation) Act, 1908, that the directors may be ordered to register the transfer of a certain share. This company, though not necessarily a one-ship company, at the present moment possesses only one ship ; it is not a private company. What is the position of a shareholder in a company such as this ? He has a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company. If, for instance, to take a common case, the articles provide that before transferring to a stranger the shares shall be offered on certain terms to other shareholders, a man coming into that company takes subject to that restriction, and he cannot transfer to a stranger without having first made an offer of the shares to the shareholders. \So, if there was a condition which is not common, but, I conceive, quite possible, that no transfer should be made to a married woman, that condition would, I think, be perfectly good. Subject to that right, the share-

(1) [1895] 2 Ch. 404.

(2) *L. R.* 8 Ch. 446.

holder is at liberty to transfer a share as much as he is at liberty to sell a chair or table or any other property.

In the present case we are dealing with fully paid up shares where there is no question of escaping from liability to calls or anything of that kind. But it was at one time thought that where the directors had a power to object to a transfer that could not be exercised properly unless the directors stated the grounds of the decision at which they had arrived. In the case of *Ex parte Penney* (1) it was decided by the Court of Appeal (James L.J. and Mellish L.J.) that it was not necessary for directors to assign reasons, but the Court will presume that they did exercise their power honestly and rightly, unless it appears by the document itself or by a confession on their part or by some other circumstance that they have not done so. For instance, if it had been a case not under the Companies Act but an action, then, of course, the plaintiff would have to prove his case. So any one coming under this rule must prove his case. In the case of *Ex parte Penney* (1) that great judge Mellish L.J. says (2): "The directors have no right to say, 'We will force a particular shareholder to continue a shareholder, and we will not allow him to transfer his shares at all.' That would be an abuse of their power. In the same way it would be an abuse of this power to object, on any ground not applying personally to the transferee, to say, for instance, that a particular shareholder should not transfer his shares till he had given security for the calls." That lays down a principle which seems to me to be perfectly sound and a principle which has been followed, so far as I am aware, for at least forty years, and I should be very sorry in any way to infringe upon it. The point which is taken by Mellish L.J. is this: You may look and see personally who the transferee is. There may be personal objections to him; it may be because he is a quarrelsome person, it may be because he is an uncertain person, or it may be that he is acting in the interests of a rival company, or something of that kind. All those things are fairly included in the word "personal"; but to seek to say "We will not accept any transfer of a single share from a particular shareholder who holds a large number" is, it seems to me, an abuse of the power which was conferred by the clause in the articles.

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(1) L. R. 8 Ch. 446.

(2) L. R. 8 Ch. 453.

C. A.      Now in the present case we know the reasons for which the  
 1916      transfer was refused. It is stated in documents, it is stated in the  
 BEDE STEAM evidence, to which I will call attention if need be. In this company  
 SHIPPING there is to be found in article 22 an express right that the  
 COMPANY, registered holder may transfer all his shares, subject only to  
 LIMITED. the restrictions in the articles. Article 24 contains the restriction  
*In re.* which is applicable to this case. [His Lordship read the article  
 Lord so far as it deals with fully-paid shares, and continued :] It  
 Cozens seems to me that that article emphasizes the proposition which  
 Hardy M.R. Mellish L.J. referred to, that objection must be taken on grounds  
 ——— personal to the transferee that he is not a proper person to be a  
 member thereof in the interests of the company. Unfortunately,  
 in the present case there are very keen family disputes between the  
 directors, two of whom take one view and the other, the transferor,  
 another. The view which was taken by the directors appears, I  
 think, with perfect clearness when you look at the minutes of the  
 meeting at which this transfer was refused. [His Lordship read the  
 minutes of the directors' meeting, the effect of which is set out  
 above, and the certificate, and continued :] Under those circum-  
 stances the learned judge has found as a fact, which seems to me to  
 be abundantly clear, that in substance the opinion of the directors  
 was clearly shown. They said in effect that in the case of any trans-  
 feror proposing to transfer one single share "We shall decline to  
 approve such transfer." Is that an abuse of the power conferred by  
 article 24, or is it not ? In my opinion it is. You might just as  
 well say "We refuse to register any transfers from you because we  
 do not approve of you splitting up your shares and therefore increas-  
 ing the number of shareholders," or anything of that kind. The  
 illustration given by Chitty J. in *In re Bell Brothers* (1) seems to me  
 very much in point : "If the reasons assigned are legitimate, the  
 Court will not overrule the directors' decision merely because the  
 Court itself would not have come to the same conclusion. But if  
 they are not legitimate, as, for instance, if the directors state that  
 they rejected the transfer because the transferor's object was to  
 increase the voting power in respect of his shares by splitting them  
 among his nominees, the Court would hold that the power had not  
 been duly exercised."

(1) 65 L. T. 245, 246.

In this case one of the directors gave evidence and said in cross-examination that in the circumstances he would not register any transfer of a single share from a fellow-director with whom he had had a quarrel. Is it possible to say that that was a proper exercise of the power? Or, in other words, is it possible to say that refusing to transfer shares because you do not approve of splitting up the holding, when you have no personal objection of any sort or kind to the proposed transferee, is a proper exercise of the power? In my opinion it is not. The certificate given by the directors agrees with the minutes, and on the face of them it seems to me that the directors are attempting to use this article 24 for a purpose for which the article was plainly not intended.

Then it is said that the directors are not bound to act only on those reasons which they have assigned. They may in good faith think it undesirable that the shares should be split up. That is quite plainly a bad reason in my opinion, and the directors ought not to be allowed to state their reason in the certificate itself to the transferee and then to say that was not the only reason, but they had other and different reasons.

In my opinion it is consistent with all the authorities, with *Ex parte Penney* (1), with Chitty J.'s decision in *In re Bell Brothers* (2), and with the case of *In re Coalport China Co.* (3), to say that this is a case in which the Court is entitled, and I think bound, to interfere and to say that it is not competent for the directors to deprive their brother shareholder of his rights as a shareholder and of the power to dispose of a single share in this company by refusing to register the transfer of his shares singly to any person whatever. In my opinion the view taken by Eve J. was perfectly right and the appeal should be dismissed.

WARRINGTON L.J., after reading the letters and the minutes of the directors' meeting of February 3 and the certificate given by the directors, continued: I read that certificate as meaning that it was the opinion of the directors that this gentleman as transferee of a single share should not be a member of the company, and that it was not the opinion of the directors that there was any objection to the transferee on any ground personal or financial. In fact, in my

(1) L. R. 8 Ch. 446.

(2) 65 L. T. 245.

(3) [1895] 2 Ch. 404.

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opinion, the certificate agrees with the view which has been expressed by Mr. John Frew in his letter and at the meeting as recorded in the minutes. The directors refused, on that view, to register this transfer; they thereby deprived the transferee of his right to be a member of the company; they deprived their fellow-shareholder of the right to sell his share and to retain the purchase-money, which, as I understand, he had actually received from the transferee. Was that justified by the articles? The article gives them one ground, and one ground only, for refusing to register the transfer of a fully-paid share, namely, that in their opinion it is contrary to the interests of the company that the proposed transferee should be a member. I agree that, if they had simply expressed their opinion and we knew nothing more about it, it would not be for us to examine or to inquire into the ground on which they had formed that opinion; but in the present case we know on the facts that they formed no such opinion at all, but the opinion they really formed was that it was contrary to the interests of the company that Mr. B. S. Elder should be allowed to transfer his shares singly or in small lots. That seems to me to be a ground not provided for by the articles. What the directors have done is in fact an attempt to give themselves the power, or to assert that they possess the power, to refuse to allow a transfer of shares in order that they may carry out some line of policy or assert some principle for the carrying out of which, or the assertion of which, the articles do not provide. [His Lordship read the passage quoted by the Master of the Rolls from Chitty J.'s judgment in *In re Bell Brothers* (1), and proceeded:] With some alteration in detail, what has happened in the present case is exactly the state of things put there by Chitty J. and held by him not to be a due exercise of the power.

In my opinion the directors have refused this transfer on a ground not within the articles, and consequently their refusal is of no effect, and the learned judge was right in making the order he did for the rectification of the register by inserting the name of the transferee and the address of the transferee.

SCRUTTON L.J. I regret I am unable to agree with the judgments which have just been pronounced. It is unnecessary to say that I

differ from the Master of the Rolls and Warrington L.J. in a question which involves company law with the greatest hesitation, and I have hesitated as to whether I should not simply say "I am unable to concur" and no more, but I have come to the conclusion that it is my duty to state my reasons.

The appeal is one from the judgment of Eve J. ordering a certain transfer to be registered, and the question is whether a certain action of the directors of the company was or was not within the powers given them by the articles of association. Ordinarily speaking, every share of a shareholder is transferable without restrictions. It is his property, and the Court will protect the holder, but because it is not desirable in the interests of the company that unrestricted alienation should take place the practice has grown up of inserting certain restrictions on the power to transfer. Sometimes it is that the directors and managers may in their discretion refuse to register transfers of shares to a person of whom they do not approve. Sometimes a further restriction is added, as in the particular article we have now to construe. The article in the case of this company is: [His Lordship read article 24 so far as it relates to a fully-paid share.] I do not think there is any difference between the members of the Court as to the principle which is to be applied in dealing with any question which arises under that article. If the Court is to interfere, the applicant must satisfy the Court either that the directors have not honestly formed the opinion mentioned in the article, or that, though they have formed such an opinion, there are no reasonable grounds for the opinion. That latter view is expressed in some of the authorities by saying that they must not act arbitrarily or capriciously, which I take to be very much the same thing as the provision one is accustomed to in the case of juries, that if there are materials upon which a jury can come to a particular view reasonably, though the judge may have come to a different view he is bound by the opinion expressed by the jury. It is not enough in my own view that the Court should think that the opinion of the directors was wrong. It is not for the Court to decide that matter; it is for the directors to decide, provided there are grounds upon which they can reasonably express such an opinion. Now the learned judge below, who saw one of the directors, has found that these directors did form an honest opinion, and as

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C. A. far, therefore, as that branch of the principle is concerned there is  
1916 no ground for interfering with their action. But, as I understand it,  
BEDE STEAM my brothers take the view that, though they formed an honest  
SHIPPING opinion, the matters they dealt with were such that they could not  
COMPANY, reasonably form the opinion, and that therefore they have exceeded  
LIMITED. the powers given them by the articles and the view of Eve J. was  
*In re,* right. That involves my stating as shortly as I can from my point  
Scrutton L.J. of view the matters which Warrington L.J. has just gone through,  
to see whether when these directors honestly certified, as the  
judge has found that they did, that in their opinion it was contrary  
to the interests of the company that the transferee should be a  
member, though there were matters which might induce the Court  
to take a different view of it, there were grounds on which they  
could honestly form such an opinion. This company, not as far as  
its legal constitution was concerned but as far as actual members  
were concerned, had been almost entirely a family company, as is so  
common with many shipping companies, comprising the members  
of the family, the managers, the insurance brokers, and the man who  
supplies the stores. The father, who had been the originator of the  
firm, died. Some years afterwards the mother, who held a large  
number of shares, died. There were three directors or managers,  
Mr. B. S. Elder, the transferor in this case, Mr. John Frew and Mr.  
Edward Elder, the two directors who certified in this case. Before  
the transfer a bitter dispute arose between the three owing to the  
terms of the mother's will. Mr. B. S. Elder strongly objected to the  
mother's will. He has taken steps which failed to set it aside. He  
told his brother and his half-brother that he, in consequence of their  
refusing to accept his views of the will, should be their bitter enemy,  
and as the first step in the enmity he raised the point whether there  
were really any directors in the company at all, and his solicitors  
threatened in December to wind up the company. The next thing  
that happened which gave rise to dispute in this case was that Mr.  
B. S. Elder, who has a large number of shares in this company, but  
who had taken no particular part in the management, presented for  
registration two transfers of single shares, one of them being the  
transfer in question in this action. One of them was to a lady who  
was housekeeper in the house in which he lived; the other was to a  
gentleman who was a clerk in the office of the clerk of the peace for

the county of Durham, in which Mr. B. S. Elder was himself employed. Mr. B. S. Elder gave at the meeting, according to the evidence, a statement of why he transferred those shares. He said that Mr. Lewis, the clerk, was a clever man and he (Mr. B. S. Elder) wanted to avoid "hole in corner" meetings, and he said as a lady had died he wanted a lady to replace her on the register of shares. The lady who had died was his mother and held 560 shares; the lady he wanted to replace her was the housekeeper of the house in which he lived, and she would have one share only. Well, different things strike different minds in different ways. These two transferees apparently have excited no suspicion in my brothers' minds at all. All I can say is they arouse the liveliest suspicion in my own mind. I am possibly wrong, because my brother Warrington agrees with the Master of the Rolls, but I should have thought it was perfectly reasonable for the directors to approach these transfers in a state of the liveliest suspicion. The reasons which actuated the directors in refusing to register the transfers as they did and certifying that in their opinion it was contrary to the interests of the company that these transfers should be registered were these: We have two letters from one director before the meeting; we have the minutes of what took place at the meeting; we have the certificates in the terms of the articles; and we have the cross-examination of one of the directors, who states again the reasons which influenced him. Now the letters are these: [His Lordship read the letters above set out, and continued:] The minutes refer again, as the letters do, to the transfer of single and small lots of shares, and point out that the company, which was formed as a family concern, would become thereby altogether of a different character. When Mr. Edward Elder was re-examined he said this: "We did not give all our reasons for this conclusion at the meeting. Our reasons were that in our opinion the sales were not bona fide, and that the transferees were really the nominees of the transferor. Taking the surrounding circumstances into consideration, there was some ulterior motive in getting these people as members." Now, if I am to judge by that evidence of the reasons which actuated the two directors, I think it was a mixed reason. One reason was that members were being introduced into the company who were not members of the Elder-Frew family and had no connection with shipping in the sense that

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they supplied goods to the company or introduced business to the company, or could be useful in the management of the company. Added to that, I think there was the further reason, which I have no doubt actuated the directors very forcibly, that these members were being introduced by a gentleman who had expressed his intention to wind up the company if he could, and he gave as his reason that he did not want "hole in corner" meetings in the case of one transferee, and in the case of the other transferee, the lady, he gave a reason which appears to me to be simply ridiculous. The reason actuating the directors being, as I think it was, that a change in the constitution of the company was being brought about by a gentleman who had avowed his intention to wind up the company, I am unable to say that the directors might not reasonably take that into consideration in considering whether it was to the interest of the company that the proposed transferee should be a member thereof. It seems to me to be a question of fact whether that is or is not a justification to the directors. My learned brothers think it is not. All I can respectfully say is, having given the best consideration to the matter I can, and it not being material what my own opinion is in the matter, the only matter of any materiality being whether directors acting honestly, as these directors have been found to have acted, could come to such a conclusion, I think there is material on which they could honestly come to the decision to which they came.

There is only one more matter I wish to mention. There are passages in the judgment of Chitty J. in *In re Bell Brothers* (1) which I think are contrary to the views which I have taken. Chitty J. says: [His Lordship then read the passage which had been read and approved by the Master of the Rolls and Warrington L.J., and continued:] He emphasizes that a little by saying (2): "I think that a power to approve a transferee is confined to the transferee personally. In the exercise of such a power the inquiry of the directors is confined to the transferee himself; the directors are not concerned in any way with his cestui que trust; they are not justified in extending their inquiry to the persons of the beneficiaries; and if they were at liberty to do so they would in most cases have to proceed on mere conjecture

(1) 65 L. T. 245.

(2) 65 L. T. 248.

or surmise." I am respectfully not able to agree with those two passages.

Take the instance which I have mentioned in the course of the argument. Supposing the directors have reason to believe that the transferee is a nominee of a person who has been trying to get control of the company—for example, of a German company trying to get control of an English company, and for that purpose putting forward a series of nominees unobjectionable in themselves, but who the directors have reason to believe are really nominees of a German agency ; if Chitty J.'s view is right, the directors could not consider that matter at all ; they could look at nothing but the proposed transferee and could not look at the power behind him. I respectfully disagree with that, and I think that Eve J. disagreed with it too, because Eve J. said : " Nor are the pecuniary qualifications of the transferee the only elements to be considered ; it is the duty of the directors to look at all the relevant circumstances in which the transferee is placed." That is to say, they have to consider whether he may be acting for some other person, and whether the object of that other person is contrary to the interests of the company.

One other matter I wish to mention, and it is this : I think that Eve J., with great respect to him, has taken the view rather that it is his opinion which is important, that is to say, whether he thinks the directors were right rather than whether there were materials on which the directors could come to the view that they came to, for I find Eve J. says, in dealing with what has happened, " I cannot . . . construe that as a threat necessarily hostile to the company." With great respect to the learned judge, that does not appear to me to be the question at all. It is not a question whether the judge thinks it must not necessarily be construed as a threat hostile to the company, but whether there is material on which such a view could reasonably be formed, though the learned judge disagreed with it.

For these reasons I am unable to assent to the judgments given by the other members of the Court, and the reason for which I dissent is this : that, it having been found that in the opinion of the directors it was contrary to the interests of the company that the proposed transferee should be a member of the company, and that that was an honest view, there appear to me to be materials

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 1916 not the members of this Court would have themselves taken it or

BEDE STEAM not.

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LORD COZENS-HARDY M.R. The appeal is dismissed with costs.

Solicitors : *King, Wigg & Brightman, for George Armstrong, Sons & Rose, Newcastle-upon-Tyne ; Sayer, Ledgard & Smith, for Wilsons, Ornsby & Cadle, Durham.*

J. R. B.

ASTBURY J.

HOSACK v. ROBINS.

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[1916 H. 1261.]

Nov. 15.

*Emergency Legislation—Mortgage—Charging Order on Shares before War—Assignment after War of Shares subject to Charge—Action against Assignees to enforce Charge by Sale—No Leave obtained—“Sale in lieu of foreclosure”—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (b)—Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18), s. 1, sub-s. 1 (b).*

In February, 1916, the defendants bought shares subject to a charging order obtained by the plaintiff before the war. On June 27, 1916, the plaintiff, without obtaining leave under the Courts (Emergency Powers) Acts, 1914 to 1916, issued a summons to enforce the charging order against the defendants by sale of the shares :—

*Held*, that the plaintiff being in the position of a mortgagee under the charging order (see Judgments Act, 1838, s. 14) was really applying for his proper remedy of “sale in lieu of foreclosure,” and as his charging order was before the war, leave was necessary under the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 (b), as amended by the Courts (Emergency Powers) (No. 2) Act, 1916, s. 1, sub-s. 1 (b), although the defendants had only acquired the shares after the war.

*Leggott v. Western* (1884) 12 Q. B. D. 287 and *D’Auvergne v. Cooper* [1899] W. N. 256 discussed.

#### ORIGINATING SUMMONS.

On April 25, 1913, the plaintiff recovered judgment against Shanks for 62*l.* and costs. and on June 13, 1913, he obtained a charging order absolute on Shanks’ interest in certain shares in

Ayre & Kingcome, Limited. Shanks subsequently became bank-rupt, and in February, 1916, the official receiver, who was appointed receiver of the assets, seized and sold the shares to the defendants subject to the charging order.

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On June 27, 1916, the plaintiff issued this summons to enforce the charging order against the defendants. He asked for an account of what was due to him from the defendants under the charging order, and that the shares might be sold and the purchase-money lodged in Court subject to further order, and that such further order might be made in the premises as to the Court might seem just.

On October 12, 1916, the Master dismissed the summons on the defendants' preliminary objection that leave to issue it had not been obtained under the Courts (Emergency Powers) Acts, 1914 to 1916.

At the plaintiff's request the summons was then adjourned into Court on this preliminary point.

*Percy Wheeler*, for the defendants. Sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914 (so far as material hereto), provides that from and after the passing of the Act (i.e., August 31, 1914) no person (except after application to the Court as therein provided) shall (a) proceed to execution on, or otherwise to the enforcement of, any judgment or order of any Court (whether entered or made before or after the passing of the Act) for the payment or recovery of a sum of money; or (b) foreclose or realize any security for the purpose of enforcing the payment or recovery of any sum of money or in default of the payment or recovery of any such sum of money. This sub-section does not apply to any sum of money due and payable in pursuance of a contract made after August 4, 1914.

Sub-s. 2 provides that if the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the war, the Court may in its absolute discretion stay execution or defer the operation of any such remedies as aforesaid for such time and subject to such conditions as it thinks fit.



ASTBURY J. This section is amended by s. 1, sub-s. 1, of the Courts (Emergency Powers) (No. 2) Act, 1916, which provides that in s. 1, sub-s. 1, of the principal Act—(b) the provisions relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure, and by sub-s. 3 this amendment takes effect as from May 25, 1916.

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Now this summons is either an application to enforce the judgment or charging order within s. 1, sub-s. 1 (a), of the principal Act or it is an application for “sale in lieu of foreclosure” within s. 1, sub-s. 1 (b), of the amending Act.

Under the Judgments Act, 1838, s. 14, a charging order entitles the judgment creditor “to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.” He becomes an incumbrancer on the shares, and his remedy is “to institute separate proceedings in order to obtain a sale or foreclosure of the shares subject to the charging order”: *Leggott v. Western* (1), approved in *Kolchmann v. Meurice*. (2) It is true that the plaintiff here only asks for a sale. But he can only ask for it in his character of mortgagee. That is clearly “a sale in lieu of foreclosure” within the Emergency Acts, and the summons could not be issued without leave.

*Harold Simmons*, for the plaintiff. I am not seeking to enforce the judgment or charging order against Shanks. I am suing the defendants on the contract implied in the assignment of February, 1916. The Emergency Act, 1914, is therefore inapplicable.

[ASTBURY J. You are really suing the defendants on the charging order of June 13, 1913, subject to which they took their assignment.]

They only became subject to the charging order in February, 1916. The emergency legislation was intended to protect persons who having entered into contracts before the war were, owing to circumstances attributable to the war, unable to fulfil their obligations. It was not intended to protect subsequent purchasers of property subject to those contracts. They could not possibly say that they were unable to pay by reason of the war.

[ASTBURY J. I think that was probably the intention, and it would have been an excellent argument on an application for leave

(1) 12 Q. B. D. 287, 289.

(2) [1903] 1 K. B. 534.

to sue. But it does not excuse you for not making that application. ASTBURY J. The language of the statute clearly requires it.]

There is a second point in this case. The only remedy under a charging order is sale, not foreclosure : *D'Auvergne v. Cooper*. (1) The application is therefore not a proceeding "for foreclosure or for sale in lieu of foreclosure," a phrase which clearly connotes alternative remedies. The Emergency Acts are therefore inapplicable.

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ASTBURY J. (after stating the facts). Under the Judgments Act, 1838, s. 14, the charging order of June 13, 1913, entitled the plaintiff "to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." These proceedings must therefore be regarded as proceedings to enforce a charge given in that manner by Shanks to the plaintiff on June 13, 1913. It is true that the defendants only acquired the shares subject to the charge in February, 1916. But the charge itself was given on June 13, 1913, i.e., before August 4, 1914, so that as regards date the Emergency Act of 1914 was applicable. [His Lordship read s. 1, sub-s. 1 (b), of the principal Act, with the provision that the sub-section should not apply to contracts made after August 4, 1914. He also read s. 1, sub-s. 1 (b), of the amending Act.]

The plaintiff has taken two points. First, he contends that the object of the principal Act was to prevent persons liable under contracts made prior to the war from being ordered to make payments which by reason of circumstances attributable to the war they were unable to make, and that the defendants, whose liability arose long after the war, were not within the scope of that protection. It is true that was the apparent policy of the statute. But in the present case the plaintiff is seeking to enforce a charge of June 13, 1913, and is not in any way suing on any contract made in February, 1916. Whatever may have been the intention of the Legislature, this summons is clearly a proceeding to enforce a charge by "sale in lieu of foreclosure" within the meaning of the amending Act of 1916, and preliminary leave is required.

Secondly, the plaintiff contends that the employment of the phrase "proceedings for foreclosure or for sale in lieu of foreclosure"

ASTBURY J. shows that the amending Act only refers to cases where the plaintiff has the alternate remedies of foreclosure or sale in lieu of foreclosure. I am not satisfied that the plaintiff is not entitled to those alternate remedies.

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In *Leggott v. Western* (1), which was approved by the Court of Appeal in *Kolchmann v. Meurice* (2), it was held that the plaintiff, who had recovered judgment in an action and obtained a charging order on shares, could not get an order for sale in that action, but must "institute separate proceedings in order to obtain a sale or foreclosure of the shares subject to the charging order."

In *D'Auvergne v. Cooper* (3) the plaintiff, who had obtained a charging order on shares, brought an action to enforce the charge, claiming foreclosure or sale. The defendant did not enter an appearance, and the case came on as a short cause on motion for judgment. The shares being depreciated, the plaintiff asked for foreclosure, but North J. held that his proper remedy was sale, not foreclosure, and gave him leave to bid. The case is only reported in the *Weekly Notes*. Whether the note is accurate or not, it is not material here, as in the present case the plaintiff as mortgagee under the charging order is asking for a sale as the appropriate remedy for enforcing his security. That must clearly be a sale in lieu of foreclosure within s. 1, sub-s. 1 (b), of the amending Act, so that application for leave is necessary.

The summons must therefore be dismissed with costs.

Leave to appeal refused.

Solicitors : *Sutton, Ommanney & Rendall ; Clowes, Hickley & Steward.*

(1) 12 Q. B. D. 287, 289.

(2) [1903] 1 K. B. 534.

(3) [1899] W. N. 256.

*In re* FLETCHER.  
READING *v.* FLETCHER.

[1916 F. 236.]

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20.

*Merger—Intention—Interest—Duty—Subsequent Dealings—Evidence.*

Two properties A and B having been included in one lease at a low ground rent and subsequently separately assigned by the lessees, the reversioners in fee took an assignment of property A and four other leasehold properties for the residue of the respective terms.

There was no direct evidence that they then had any intention against merger.

About nine months later the reversioners mortgaged the term in property A and the entire reversion separately:—

*Held*, that, in the absence of any proof, as in *Lea v. Thursby* [1904] 2 Ch. 57, that it was the reversioners' interest or duty to keep the term alive at the date of the assignment, the subsequent mortgage was irrelevant as to their intention at that previous date.

*Held*, also, that the mere fact that merger would prevent the reversioners from dealing with the term and the freehold ground rent separately did not constitute any interest against merger within the authorities, and that the term had therefore merged.

WITNESS ACTION.

By a lease dated February 15, 1851, Howard Simcox demised 3904 square yards of land at Harborne, Staffordshire, to Joseph Singleton for ninety-six years from March 25, 1850, at a rent of 4*l.* 0*s.* 8*d.* It was provided that if the lessee wished to erect a house on any portion of the land he might do so (subject to the conditions therein contained) on paying an additional rent of one halfpenny per square yard for the site.

On March 7, 1861, the lessor gave the lessee written permission to build a house on a site containing 1820 square yards, and the additional rent on the site was fixed at 2*l.* 10*s.* The lessee then built a house called Parkhurst on the 1820 square yards. The remaining portion of 2084 square yards was garden ground.

In 1865 the lessee's executors sold Parkhurst and the garden plot by auction in two lots to Reading and Spencer under conditions stipulating that Spencer, the purchaser of the garden plot, should



ASTBURY J. have his assignment rent free, and that Reading, the purchaser of Parkhurst, should covenant to produce the lease to Spencer and should take his own assignment subject to the entire rent of 6*l.* 10*s.* 8*d.* made up of the original rent of 4*l.* 0*s.* 8*d.* and the additional rent of 2*l.* 10*s.* on the Parkhurst site.

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By an assignment of October 13, 1865, the garden plot was assigned to Spencer for the residue of the term rent free, Reading joining and covenanting with Spencer to pay the entire rent for the residue of the term and to produce the lease.

By an assignment of the same date Parkhurst was assigned to Reading for the residue of the term at the entire rent of 6*l.* 10*s.* 8*d.*, Reading covenanting during the residue of the term to pay this rent, perform the covenants of the lease in respect of Parkhurst, and indemnify the assignors in those respects.

Parkhurst subsequently became vested in Reading's widow, Hannah Reading, for the residue of the term.

By her will, dated September 20, 1913, Hannah Reading, after appointing Holland and her son (the plaintiff) and her son-in-law (the defendant) her executors and trustees, gave and bequeathed her residuary real and personal estate (which included Parkhurst) to her trustees upon trust for sale, the proceeds to be divided between her daughters Emily Fletcher (the defendant's wife) and Edith Reading.

The testatrix died on October 16, 1913.

By a conveyance on sale dated January 27, 1914, the freehold reversion in all the premises demised by the lease of 1851 was conveyed to Emily Fletcher and Edith Reading as tenants in common in fee simple subject to and with the benefit of the lease.

By an assignment dated December 3, 1914, Parkhurst and four other leasehold properties were assigned by Hannah Reading's executors to the residuary legatees, Emily Fletcher and Edith Reading, as tenants in common in equal shares for the residue of the respective terms, each residuary legatee covenanting as to one half of the premises to indemnify the executors against the respective rents and covenants.

By a mortgage dated October 7, 1915, and made between Emily Fletcher and Edith Reading, thereafter called the mortgagors, of the first part, the defendant of the second part, and the mort-

gatee of the third part, after reciting the lease of 1851, the erection of Parkhurst with the additional rent, the assignment in 1865 of Parkhurst to Reading at the entire rent of 6*l.* 10*s.* 8*d.*, and that Parkhurst was now vested in the mortgagors as tenants in common for all the residue of the term subject to the rent of 6*l.* 10*s.* 8*d.*, and after reciting the conveyance of the freehold reversion on the entire lease to the mortgagors, their heirs and assigns, as tenants in common subject to and with the benefit of the lease, Parkhurst was assigned to the mortgagee for the residue of the term, and the freehold reversion in the entire property was conveyed to the mortgagee in fee simple, subject to and with the benefit of the lease, by way of mortgage for securing the repayment of 300*l.* lent to the mortgagors. The mortgagors and the defendant jointly and severally covenanted for payment, but the proviso for redemption of "the said leasehold and freehold premises" was limited to the mortgagors.

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The above amount was in fact borrowed on the defendant's behalf, so that as between himself and the mortgagors he was the principal debtor and the mortgagors were only sureties.

On November 27, 1915, Emily Fletcher died intestate and without ever having had any children, and on January 21, 1916, the defendant, her husband, took out letters of administration to her estate.

On March 3, 1916, the plaintiff, as heir-at-law of his sister Emily Fletcher, taking the view that the lease so far as Parkhurst was concerned had merged in the freehold, commenced this action against the defendant for a declaration that he was entitled in fee simple in possession to Emily Fletcher's moiety of Parkhurst and in reversion on the lease to her moiety of Spencer's garden plot, and for consequential relief. He also asked for a declaration that he was entitled to be indemnified by the defendant against the mortgage and for consequential relief.

The defendant did not dispute the plaintiff's title to the freehold reversion, but contended that the lease of Parkhurst was still subsisting on the ground that it was contrary to the duty, interest, and intention of the reversioners to merge it on taking the assignment of December 3, 1914. He was willing to exonerate the plaintiff and his freehold reversion from liability under the mortgage.

The plaintiff's evidence showed that Reading had expressed

ASTBURY J. a desire to purchase the freehold of Parkhurst in order that it might  
 1916 be worth his while to spend money in repairs and improvements,  
 FLETCHER, and in consequence of this his widow, Hannah Reading, had many  
*In re.* times in the presence of her son the plaintiff and her two daughters  
 READING expressed her desire to purchase the freehold, saying that it was  
 v. her wish and duty to make Parkhurst a freehold. Towards the  
 FLETCHER. end of her life when she was ill the freehold reversion on the lease  
 was advertised for sale, and her three children arranged that her  
 solicitor should bid for the property in order to carry out her wishes,  
 so that if she recovered she could take it over, and if she died those  
 of her children who should become entitled to Parkhurst under  
 her will should complete the purchase.

The sale in fact took place on October 23, 1913, after Hannah Reading's death, and the two daughters on whose behalf the contract was entered into expressed their gratification at having thus carried out their mother's intention of making Parkhurst a freehold.

Edith Reading was not called as a witness to prove any change of intention at the date of the assignment of the Parkhurst term.

The case was argued on the footing that Spencer was still the leaseholder of the garden plot, no devolution of his title being in evidence.

*Hon. Frank Russell, K.C., and Christopher Farwell*, for the plaintiff. Merger is prima facie a question of intention. If there is direct evidence of intention either way at the date of coalescence, cadit quaestio. Subsequent dealings are then irrelevant. If there is no such direct evidence, the Court looks to the duty or interest of the person in whom the estates coalesce, and raises a presumption of intention accordingly : *Ingle v. Vaughan Jenkins* (1) ; *Capital and Counties Bank v. Rhodes*. (2)

In cases of presumption arising from alleged interest or duty subsequent dealings have been treated as relevant : *Lea v. Thursby* (3) ; *Grice v. Shaw*. (4) But unless there is some scintilla of interest or duty to raise a presumption of intention at the date of coalescence it cannot be raised from the subsequent dealings alone.

In the present case there is uncontradicted evidence that the

(1) [1900] 2 Ch. 368.

(2) [1903] 1 Ch. 631, 652.

(3) [1904] 2 Ch. 57.

(4) (1852) 10 Hare, 76.

two daughters intended to make Parkhurst a freehold. There was no interest or duty to prevent them carrying out that intention by their successive acquisition of the reversion and the lease. The subsequent mortgage of the lease and reversion separately is therefore immaterial.

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Apart from the direct evidence of intention the daughters were owners in fee when they took the assignment. The presumption was therefore in favour of merger: see observations in *Manks v. Whiteley* (1), ultimately affirmed sub nom. *Whiteley v. Delaney*. (2) In these circumstances the onus of proving an intention against merger is clearly on the defendant. He could easily have discharged it by calling Edith Reading.

*Micklem, K.C.*, and *Johnston Edwards*, for the defendant. The daughters' intention of making Parkhurst a freehold was carried out when they took the conveyance of January 27, 1914. The subsequent assignment of the five leaseholds on December 3, 1914, does not mention their acquisition of this freehold reversion and shows no intention to merge the term in respect of Parkhurst. If that had been intended, the proper form would have been a surrender.

The question of merger depends on "the intention, actual or presumed, of the person, in whom the interests are united": *Eorbes v. Moffatt* (3); and in cases of doubt subsequent dealings are relevant: *Lea v. Thursby* (4); *Grice v. Shaw* (5); *Hatch v. Skelton*. (6) The effect of the assignment of December 3, 1914, is doubtful, but the subsequent mortgage of the term and reversion separately on October 7, 1915, is fairly good evidence that the daughters always intended to keep the term alive.

This was both their duty and their interest. It was their duty to Spencer to keep the term alive. As termors in Parkhurst they were liable under Reading's covenant to indemnify Spencer against any rent. Indeed, apart from that covenant they were liable in case or assumpsit to indemnify him against their rateable portion

(1) [1911] 2 Ch. 448, 458; [1912] Tudor's Real Property Cases, 4th ed. pp. 244, 246.  
1 Ch. 735, 744.

(2) [1914] A. C. 132, 146.

(4) [1904] 2 Ch. 57, 65.

(3) (1811) 18 Ves. 384, 390; (5) 10 Hare, 76.

(6) (1855) 20 Beav. 453.



ASTBURY, J. of the 4*l.* 0*s.* 8*d.* which issued out of Parkhurst and the garden plot: *Burnett v. Lynch*. (1) The landlords, who were no parties to the severance of 1865, could at any time have distrained on Spencer for the 4*l.* 0*s.* 8*d.* rent or sued him for his proportion. His only remedy would have been against the termor of Parkhurst. If that term were merged Spencer's remedy would be gone.

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[ASTBURY J. Could the daughters escape liability by merger?]

They were termors bound by the covenant or implied obligation and could not escape their personal liability. But all remedy against any future purchaser of Parkhurst would be gone, at all events if he took without notice of the circumstances relating to the merger. Assuming merger, the mortgagee might sell Parkhurst and the reversion in the garden plot to separate purchasers without notice. Spencer would have no answer to a claim for the proportion of the 4*l.* 0*s.* 8*d.* rent attributable to his garden plot, and he would have no remedy against the purchaser of Parkhurst.

Again, it was the daughters' interest to keep the term alive so that they could deal with the ground rent and the beneficial lease separately. The property is worth far more than the 6*l.* 10*s.* 8*d.* rent. If they had merged the term heavy reversion duty would have become immediately payable. The onus is therefore on the plaintiff to prove an intention to merge: *Whiteley v. Delaney*. (2).

*Hon. Frank Russell, K.C.*, in reply. Whatever Spencer's express or implied rights against the termor of Parkhurst may be, which is a point of some little difficulty, the surrender of the term cannot affect them. There was therefore no duty to prevent merger.

The supposed interest in preventing merger is purely shadowy. The suggestion that an owner in fee who buys up a lease is interested in keeping the reversion and lease distinct for the purpose of future dealings would apply equally to an owner in fee paying off a charge. But in the latter case there would clearly be merger.

The reversion duty payable on merger is not the full duty payable at the end of the lease, but that duty discounted at 4 per cent. compound interest for the residue of the term: Revenue Act, 1911

(1) (1826) 5 B. & C. 589, 602, (2) [1914] A. C. 132, 151.  
604, 607, 609.

(1 Geo. 5, c. 2), s. 3, sub-s. 2. It might well have been the daughters' interest to free the property on these terms.

*Cur. adv. vult.*

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Nov. 20. ASTBURY J. (after stating the facts). This action is brought by Emily Fletcher's heir-at-law against her husband to determine whether the lease was merged in respect of Parkhurst. The question depends upon the intention of Hannah Reading's two daughters on December 3, 1914, when, being reversioners in fee under the conveyance of January 27, 1914, they took an assignment of the term in Parkhurst, to which they had become entitled under their mother's will. The intention either way may be proved by direct evidence, or an intention against merger will be presumed (1.) if it was to their interest to preserve the term, or (2.) if they were under a duty to do so.

The law is clearly and exhaustively stated on this point by the present Master of the Rolls in *Capital and Counties Bank v. Rhodes*. (1) He states as follows: "There was prior to the Judicature Act, 1873, a great difference between the Courts of Law and the Courts of Equity on the subject of merger. The rule of the former was rigid, that whenever a term of years and a freehold estate, whether for life or in fee, immediately expectant upon the term, vested in the same person in his own right, the term was merged in the freehold, whatever may have been the intention of the parties to the transaction which resulted in the union. The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in equity. They had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. Perhaps the commonest application of these principles was when a tenant for life paid off a charge upon the inheritance. The charge was considered to be still kept alive for his benefit, or for the benefit of his executors, although, if an owner in fee had paid off the charge, no such consequence would have followed. These principles were

(1) [1903] 1 Ch. 631, 652.

ASTBURY J. applicable equally to the merger of estates in land as to merger  
 1916 of charges on land. . . . A Court of Equity had regard to the  
 FLETCHER, intention of the parties, to the duty of the parties, and to the con-  
*In re.* tract of the parties, in determining whether a term was to be treated  
 READING as merged in the freehold. This being the state of the law prior  
 v. to the Judicature Act, 1873, it was enacted by s. 25, sub-s. 4,  
 FLETCHER. of that Act that 'there shall not, after the commencement of  
 this Act, be any merger by operation of law only of any estate,  
 the beneficial interest in which would not be deemed to be merged  
 or extinguished in equity.' "

The evidence in the present case which is uncontradicted, and which I accept, is that the two daughters, carrying out what their mother had stated to be her wish and duty,—having regard to her late husband's views—purchased the freehold reversion on January 27, 1914, with the object, as they stated, of making Parkhurst a freehold. This purchase, however, could not by itself effect a merger, as the term was then vested in their mother's executors, but it effectively carried out their object of securing the fee.

Subject to the form of the assignment of the term on December 3, 1914, there is no further direct evidence of intention on that date. Their desire to secure the freehold and their reasons for doing so are not, in my judgment, conclusive of the question whether at that date these ladies had any intention, one way or the other, as to merger. In all probability they had never heard of the existence of such an operation of law, and had no direct intention on the subject. Their object in securing the fee would in one sense no doubt be attained in either event, but they both formed and acted upon an intention to make Parkhurst a freehold, as they expressed it. One of them is still alive and has not been called to suggest that she or her sister had arrived at any further or other conclusion when the assignment of Parkhurst for the residue of the term was made to them, and it may be that I ought to infer from the uncontradicted evidence before me what the law would regard, in the absence of evidence to the contrary, as a continuing intention in the two ladies to make Parkhurst a freehold on December 3, 1914, and that in the circumstances this amounted to an intention to merge it. In any event I think that in the circumstances the onus of proving non-merger is upon the defendant,

and, assuming that the direct evidence is insufficient to prove intention at the relevant date, I will consider whether this onus has been discharged. ASTBURY J.

With regard to the form of the assignment of December 3, 1914, this assignment included other leaseholds of which the ladies had not acquired the reversion, and although it does not refer to the freehold reversion in question or to any intention to merge the Parkhurst term in the inheritance, it cannot, I think, having regard to the other facts proved in evidence, merely by reason of its language being in general conveyancing terms and applicable to all the leasehold interests assigned, be regarded as sufficient evidence in itself of an intention on the part of the assignees to prevent the operation of merger in respect of the Parkhurst term, the reversion of which they had previously acquired, but which fact was not referred to in the recitals.

The defendant contends that the form of the mortgage of October 7, 1915, is strong evidence of the then belief of the two ladies that the term was still in existence, and that this is evidence that on December 3, 1914, they must have intended that no merger should then take place. Now when it is proved that a person was "interested" in preventing a merger or under a duty to do so, subsequent dealings may no doubt be taken into consideration: *Lea v. Thurstby*. (1) But if no such interest or duty is shown to exist, the intention to prevent merger must, I think, be directly proved to exist at the date when a merger at law would have taken place, and if in this case, where no such evidence exists, a presumption against merger cannot be founded on "interest" or "duty" existing on December 3, 1914, the term must have then merged in the fee, and could not, of course, have been revived or re-created by the mortgage of October 7, 1915. The matter depends, therefore, subject to what I have said as to the evidence, upon whether there was such an "interest" or "duty" in or incumbent upon the two ladies on December 3, 1914, as to raise a presumption of intention on their part against merger.

First as to duty. The defendant contends that at the date of the assignment the two ladies were under a duty to Spencer, the owner of the term in the garden plot, to preserve the term in

(1) [1904] 2 Ch. 57, 65.



ASTBURY J. Parkhurst in order that he might remain entitled to resort to it, if  
1916 necessary, by way of indemnity against liability to pay the rent or  
FLETCHER, perform the covenants reserved by or contained in the lease, which  
*In re.* had been thrown on Parkhurst. The defendant contends that  
READING the reversion upon the term in the garden plot might somehow  
v. or other become vested in the future in a bona fide purchaser for  
FLETCHER. value without notice of the merger of the Parkhurst term if it  
should be held to have taken place, and that this purchaser could  
sue Spencer to enforce payment of the rent reserved by the lease  
and enforce the covenants therein.

.It is, of course, obvious that the present owners of the reversion could enforce no such claims against Spencer, but it is said, though I think in error, that such a purchaser for value without notice might be brought into existence by a sale by the mortgagee under the mortgage of October 7, 1915. This mortgage, however, apart from the documents recited in it, would be sufficient in itself to put a purchaser upon inquiry (1.) as to the existence of any continuing liability of Spencer to pay any part of the rent reserved by the lease, and (2.) as to whether merger of the term in Parkhurst had or had not taken place before the date of the mortgage, and it is difficult to see how the hypothetical purchaser without notice could be brought into existence. If such a duty as is contended for existed in the two ladies, there must have been a correlative right in Spencer to enforce its observance. I do not see how any such right could have existed, or have been enforced. The true view is, I think, that on December 3, 1914, no one was under any duty to prevent a remotely possible future injury being done to Spencer or his assigns by some future act of impropriety or carelessness which it is difficult to visualize, and that in any case no such duty lay in the path of the two ladies who at that time were the owners of the reversion, and who by the assignment merely obtained from their mother's executors the interest which they had become entitled to under her will.

In the next place, as to "interest." It is said that it was to the interest of the assignees under the assignment of December 3, 1914, to prevent merger, because, if it operated, reversion duty would have become immediately payable. No evidence has been given on this subject, nor is the point specifically raised in the

pleadings. On the facts before me it is impossible to hold that any such interest existed. If the matter had been thought of, or brought to their attention, the ladies might very well have preferred to clear their estate once for all from liability in this respect, and in the circumstances it might have been to their interest to do so.

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It is also suggested that it was to their interest to keep the term and reversion distinct, as this would enable them to deal separately with the lease and the freehold ground rent. I do not think that this suggestion is well founded. The interest referred to in the cases which raises a presumption of intention against merger must be a real one, in the sense that the owner will derive a substantial and present benefit from the non-merger, as in the case, for instance, of the payment off of a charge by a limited owner, or the interest which will be deemed to keep alive an earlier paid off charge in order to prevent charges later in date from taking priority, or, as in *Lea v. Thursby* (1), an interest in preventing a merger which would fetter the owner in dealing with his property in some defined and substantial respect. The mere fact that it would in the future be in the power of the owner of the two estates or interests in question to deal with them separately if no merger were deemed to have taken place, as, for instance, when an owner in fee pays off a charge, is not regarded as being an interest of that character which in the absence of direct evidence of intention raises the presumption in question.

Assuming that sufficient direct evidence of intention to merge on December 3, 1914, has not been given, I am of opinion for these reasons that there was no such interest or duty in or incumbent upon the two ladies on that date as to raise a presumption of intention against merger on their part, and that the defendant has failed to discharge the onus that I think, in the circumstances, is upon him of establishing that any such intention existed. The plaintiff succeeds therefore in the action, with the usual result as to costs.

Solicitors : *Chamberlain, Johnson & Levy, for Chamberlain & Johnson, Llandudno ; H. G. Kenyon, for Wallace Robinson & Morgan, Birmingham.*

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J.

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[1915 M. 2720.]

Oct. 24, 25,  
26, 31.

*Landlord and Tenant—Agricultural Holding—Tenancy Agreement—Prohibition against selling off Produce—Powers of Tenant—Last Year of Term—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 26—Contract for Sale—Material Date—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4—Date from which Tenancy commences.*

The provisions of s. 26 of the Agricultural Holdings Act, 1908, giving the tenant power to dispose of the produce of his holding, do not apply to the year before the expiration of the tenancy. Accordingly, where a tenancy agreement prohibits the tenant from selling produce off his holding, he cannot by virtue of anything contained in the section sell off during the last year of his tenancy the produce of any previous year.

In a dispute between a landlord and his tenant as to the date upon which the latter sold produce of his holding to a third party:—

*Held*, that the material date was the actual date when the contract for sale was made and not the date when, as between the contracting parties, the contract for sale became enforceable within s. 4 of the Sale of Goods Act, 1893.

A tenancy or term was granted "from " March 25:—

*Semble*, following *Ackland v. Lutley* (1839) 9 Ad. & E. 879 and *Sidebotham v. Holland* [1895] 1 Q. B. 378, that the tenancy commenced at midnight on March 25.

On this point the head-note to *Sidebotham v. Holland* (supra) goes beyond the judgment of the Court and is misleading.

THIS was an action based on alleged breaches of a tenancy agreement of a farm in Essex let by the plaintiff to the defendant. The writ was issued on November 23, 1915, and claimed an injunction to restrain the defendant from committing further breaches, damages for past breaches, and costs. The tenancy determined on March 25, 1916, and a subsequent arbitration between the parties under the provisions of the Agricultural Holdings Act, 1908, disposed of any claim for damages, so that when the action came on for hearing on October 24, 1916, the only outstanding question was one of costs, but the determination of that question involved the consideration of the points of law which form the subject of this report.

The tenancy in question was created by a memorandum of agreement dated December 12, 1905, whereby the plaintiff agreed to let

and the tenant agreed to take the farm "from" March 25, 1906, for the term of ten years, determinable on either side by twelve calendar months' previous notice in writing for that purpose being given on or before March 25, 1915. The defendant thereby (inter alia) agreed to stack upon the premises all the hay and corn that should grow thereon, and not to sell or dispose of any hay, straw, or roots without the consent in writing of the plaintiff, and to leave on the premises all the manure arising from the produce of the last year's tenancy.

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The alleged breaches upon which this action was originally based related to three sales of hay, two of which took place on August 30, 1915, and were stated by the defendant to have been made in pursuance of requisitions by the military authorities and to relate to hay produced in 1912; and the third sale, the date of which was in dispute, was ultimately found by his Lordship, as the result of the evidence given at the hearing, to have taken place on March 24, 1915. On that date, according to the evidence, the defendant sent a letter by an agent to Mr. Forrester, the purchaser of the stack of hay, offering to sell the stack for 125*l.*, and on the same day Mr. Forrester sent a letter to the defendant by the same agent accepting the offer. That letter had been lost. On March 25 Mr. Forrester posted his cheque for 125*l.* to the defendant, who received it on March 26. The defendant had verbally agreed that he would, if Mr. Forrester purchased the stack, procure the consent of Mr. Hosier, an adjoining farmer, to the removal of the stack across the latter's holding to the road. The defendant forgot to obtain this consent at the time of the sale, but it was ultimately given by Mr. Hosier. Mr. Forrester removed the stack in the beginning of May, 1915.

*Tomlin, K.C.*, and *W. A. Peck* (for *A. P. Vanneck*, serving with His Majesty's Forces), for the plaintiff. A covenant not to sell or remove from a farm during the last year of the term any hay, straw, or fodder that shall grow thereon prevents the tenant from removing during the last year produce grown at any time during the term, and not merely during the last year: *Gale v. Bates*. (1) The agreement in this case is wider, inasmuch as it forbids any sale or removal whatever without the landlord's consent.

(1) (1864) 3 H. & C. 84.



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Sect. 26 of the Agricultural Holdings Act, 1908, provides that during the last year of the tenancy the powers given by the section shall not apply, and relegates the tenant to the terms of his contract. Applying the principle of *Gale v. Bates* (1) to this case, the defendant had no power, without the plaintiff's consent, to sell off during the last year any hay or straw, whether produce of the last or any previous year.

The sales in question were in breach of the defendant's agreement, and they and his failure to return to the land the equivalent manorial value constituted the grounds of this action. The sales in August were made voluntarily and not under any compulsion or requisition on the part of the military authorities, and were clear breaches. With regard to the sale of the stack, we submit that there was no contract of sale until March 26, when the cheque was received: Sale of Goods Act, 1893, ss. 3 and 4. That being so, the sale did not take place until after the commencement of the last year, for the term having been originally granted "from" March 25, 1906, the last year would commence on March 26; that clearly appears from the judgment of Lindley L.J. in *Sidebotham v. Holland* (2), although in this respect the head-note to the report of the case is misleading.

The breach of his agreement by the defendant involved a threat of further breach and entitled the plaintiff to seek an injunction. The defendant has also persisted in his refusal to give the plaintiff any particulars as to the sales effected, and the costs of the action ought to be borne by him.

*Hughes, K.C.*, and *Ribton*, for the defendant. Under s. 26 of the Agricultural Holdings Act, 1908, regard must be had to the date when the crop was produced, not to the date of sale. The defendant sold off no part of the produce of the last year of his tenancy. All that he sold was produce of previous years, to which the powers given by s. 26 applied, and which, we submit, he was entitled to sell notwithstanding that the sale may have taken place during the last year of the tenancy, which, however, we do not admit was the case with respect to the March sale. The defendant fulfilled the condition of returning the full equivalent manorial value to the holding.

The sale in March, 1915, took place before the commencement of the last year of the tenancy. A tenancy for a year from March 25

begins on March 26 and ends on the following March 25, both inclusive. Therefore an act done on the later March 25 is within the term: *Ackland v. Lutley*. (1) In this case there was a sale within the meaning of s. 18, sub-s. 1, of the Sale of Goods Act, 1893, on March 25, 1915, and previous to the commencement of the last year. The question as to the date of the contract of sale does not turn on the question when the contract became enforceable, but upon the question of the actual date of the sale. Sects. 4 and 17 of the Act show that many sales may be made on an earlier date although not enforceable until a later date.

The defendant was justified in selling to the military authorities although they had not complied with all the requirements of s. 115 of the Army Act, 1881, as extended by the Army (Supply of Food, Forage, and Stores) Act, 1914. It would have been very wrong, in view of the national emergency, if the defendant had insisted on the military authorities going through the formalities of the Act, and the sales in August ought to be treated as made under the Act.

*Tomlin, K.C.*, in reply.

*Cur. adv. vult.*

Oct. 31. PETERSON J. This action is based on an alleged breach of a tenancy agreement by the defendant. The plaintiff asks for an injunction to restrain the defendant from committing further breaches and for damages for past breaches. The tenancy has now determined, and therefore an injunction cannot be granted, nor is there now any claim for damages, as under an arbitration held under the provisions of the Agricultural Holdings Act, 1908, after the institution of this action the claims of the landlord and tenant were settled and disposed of. The only question which is left is who is to pay the costs of this action, but that question involves the consideration of several legal problems in addition to the determination of disputed questions of fact.

The defendant became tenant of Southland Farm, Essex, under an agreement of December 12, 1905, made between the plaintiff, who was the landlord, and the defendant, for the term of ten years from March 25, 1906, determinable on either side by twelve calendar months' notice given on or before March 25, 1915. Notice was duly

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PETERSON given by the plaintiff, and the term came to an end in March, 1916.  
 J. Under the agreement the defendant contracted to stack upon the  
 1916 premises all the hay and corn that should grow thereon, and not to  
 MEGGESON "sell or dispose of any hay, straw or roots without the consent in  
 v. writing of the plaintiff," and to leave on the premises all the manure  
 GROVES. arising from the produce of the last year's tenancy. The effect of  
 these provisions is to prohibit the defendant from selling or disposing  
 of any hay, straw, or roots at any time during the term without the  
 plaintiff's consent.

Three sales of hay by the defendant have been established, two  
 of which took place on August 30, 1915, while the date of the third  
 sale is in dispute. The defendant alleges that it took place on  
 March 24 or 25, 1915, while the plaintiff's case is that the sale was on  
 a later date. In the case of all three sales it is necessary to consider  
 the effect of s. 26 of the Agricultural Holdings Act, 1908, on the  
 tenancy agreement. [His Lordship read the section and continued :]  
 The defendant contends that by virtue of that section he was enabled  
 during the period before the commencement of the last year of the  
 tenancy to sell the hay produced by the holding subject to the  
 obligation to return to the holding the full equivalent manurial  
 value of the hay which he sold, and that during the last year of the  
 tenancy he was by the joint operation of the section and the agree-  
 ment only prohibited from selling or removing the hay which was  
 produced by the holding during the last year of the tenancy, and that  
 the sale of the stack of hay on March 24 or 25, 1915, took place  
 before the commencement of the last year of the tenancy, while  
 sixteen trusses of hay which were sold on August 30, 1915, consisted  
 of hay produced by the holding in a previous year.

In my opinion the section clearly enables a tenant to sell the  
 produce of the holding before the commencement of the last year  
 of the tenancy, subject to the obligation to return "as soon as may  
 be" its full equivalent manurial value; but I am unable to accept  
 the contention that the defendant is only prevented during the last  
 year of the tenancy from selling or removing the produce of that  
 year. The argument is based on sub-s. 1 (b) of the section, which,  
 it was contended, refers to the produce of the year before the  
 expiration of the tenancy. That, however, is not what the clause  
 says. Sub-s. 1 gives to the tenant full right (1.) to practise any

system of cropping of the arable land, and (2.) to dispose of the produce, and then provides that the section which gives these powers shall not apply as respects the year before the expiration of the tenancy. This provision relates to a period and not to the produce of a period, and therefore excludes for the last twelve months of the tenancy the power conferred on the tenant by the section to sell the produce of the holding. The defendant's rights during the last year of the tenancy are consequently governed by the provisions of his tenancy agreement which prohibit him from selling or disposing of any hay without the plaintiff's written consent.

The facts relating to the sale of the stack of hay are as follows : [His Lordship stated the facts relating to the sale as above set out, and continued :] On these facts there was a contract for sale of the stack on March 24, and under ss. 17 and 18 of the Sale of Goods Act, 1893, the property in the stack passed to the defendant on March 24. The plaintiff, however, contended that there was no sale of the stack until at least the cheque for 125*l.* was cashed on March 26 or 27, and relied for this contention on s. 4 of the Sale of Goods Act, 1893. . It may be that he is right in contending that the letters of March 24 written by Mr. Forrester to the defendant did not constitute a note or memorandum in writing of the contract, as they did not include the provision that the defendant should procure Mr. Hosier's consent to the removal of the stack over his land, and that Mr. Forrester's cheque could not be considered as a " gift of something in earnest to bind the contract or in part payment " until it was received by the defendant or cashed. But these considerations, relevant as they might be if the defendant had been trying to enforce the contract against Mr. Forrester, have no relevancy to a case in which the contract has been completed. Sect. 4 assumes the existence of a contract and provides that it shall only be enforceable by action as between the parties to the contract in certain events. The section makes it necessary to produce certain evidence in support of the contract. It matters not when the memorandum is signed or when the payment is made. The date of the contract remains the same, and as soon as the evidence required by the statute is forthcoming, one party can enforce the contract against the other. The question between the plaintiff and the defendant is when the contract was made, not when it became

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PETERSON enforceable. In my view, therefore, the property passed to Mr.  
 J. Forrester on March 24. Having regard to this conclusion, it is un-  
 1916 necessary to consider when the last year of the tenancy commenced.  
 MEGGESON But, as this question was discussed, I may add that in my view the  
 v. decision in *Ackland v. Lutley* (1) establishes that it began at mid-  
 GROVES. night on March 25, and that, as Mr. Tomlin, for the plaintiff, pointed  
 out, the head-note in *Sidebotham v. Holland* (2) goes beyond the  
 judgments, which clearly do not disagree with the decision in  
*Ackland v. Lutley*. (1)

But the plaintiff says that in any case the defendant did not return to the holding the full manorial equivalent of this stack of hay. Under s. 26 of the Agricultural Holdings Act, 1908, the return of the manorial equivalent may be either before or after the hay is disposed of, and the plaintiff is very far from having satisfied me that the manorial equivalent was not made good to the holding. It was suggested that the defendant had the burden of proving that it had been returned to the farm. In my opinion that is not so. In the reply the plaintiff alleges that the full manorial equivalent had not been returned to the holding, and it is for him to establish the truth of the allegation. In my judgment, then, the plaintiff has not shown any ground on which he can complain of the sale of the stack of hay in March, 1915.

The sales on August 30 stand on a different basis. They were sales to which s. 26 of the Agricultural Holdings Act, 1908, did not apply, and consequently, as the plaintiff's consent to them was not obtained, they were *prima facie* breaches of the tenancy agreement. The defendant, however, in his defence alleged that the sixteen trusses of hay which formed the subject-matter of the two sales were in fact requisitioned by the military authorities. This allegation was not supported by the evidence. An officer came to the defendant's farm and inquired whether he had any hay. The defendant showed him what he had, and as the result eight trusses were taken. On the same day another officer came and obtained another eight trusses. The defendant was paid 32s. for the sixteen trusses. It was not contended that the military authorities had complied with the conditions which must be fulfilled before a requisition can be made, nor did the officers purport to exercise any compulsory powers. It was

(1) 9 Ad. &amp; E. 879.

(2) [1895] 1 Q. B. 378.

an ordinary sale in each case. The defendant therefore in these two cases committed a breach of the provisions of the tenancy agreement. The value of these trusses of hay was small and their manurial value was only 6s. 8d., and if that had been all that took place I should have hesitated before I allowed any costs to the plaintiff.

But the matter does not rest there. [His Lordship then referred to the correspondence and to the failure or reluctance of the defendant to give the plaintiff any information as to the sales, and continued:] In my opinion, therefore, the defendant must pay the costs of the action except so far as they have been increased by the issue of the sale of the stacks of hay in March and the issue whether he has returned a full manurial equivalent for the hay which he has sold, and the plaintiff must pay the defendant's costs so far as they have been increased by these issues, and the costs will be set off in the usual way.

Solicitors: *Greenwell, Higham & Co., for J. C. Pawson, Chelmsford; Adolphus G. Maskell.*

R. M.

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### BLANCHARD v. DUNLOP.

[1916 B. 1628.]

*Education—Non-provided School—Teacher—Contract of Service—Dismissal—Powers of Managers—Consent of Local Education Authority—Rights of Teacher—Education Act, 1902 (2 Edw. 7, c. 42), s. 7, sub-s. 1 (c).*

C. A.  
1916  
July 25, 26.

The provision contained in s. 7, sub-s. 1 (c), of the Education Act, 1902, requiring the consent of the local education authority to the dismissal of a teacher by the managers of a non-provided school on grounds not connected with the giving of religious instruction, was inserted, not in the interests of the teacher so as to give the teacher a right to be heard before such consent is given, but in the interests of the education authority so as to prevent instruction, for which they pay and are responsible, from being interfered with without their consent.

An agreement between the managers of a non-provided school and a teacher provided that the agreement might be determined by either party by three months' previous notice to the other party, and that, where such notice by the managers required the consent of the education authority, confirmation by such authority should be

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sufficient. The managers duly gave the teacher notice determining the agreement. Although the grounds of dismissal were not stated, it was admitted that no misconduct was alleged and that the dismissal was not on grounds connected with the giving of religious instruction. The teacher commenced this action to restrain the managers from proceeding until the consent of the education authority had been obtained and she had been heard in her own defence. Subsequently the education authority confirmed the dismissal:—

*Held*, affirming the decision of Astbury J., that neither under her agreement nor under the Education Act, 1902, had the plaintiff any such right to be heard.

Whether *Young v. Cuthbert* [1906] 1 Ch. 451 is reconcilable with *Smith v. MacNally* [1912] 1 Ch. 816, *quaere*.

APPEAL from a decision of Astbury J.

In 1913 the plaintiff entered into a written agreement with the managers of a Church of England non-provided school to act as teacher in their school at a salary to be provided by the local education authority.

The agreement, which is more fully stated in the following judgment of the Master of the Rolls, provided (*inter alia*) that the agreement might be determined at any time by either party by three months' previous notice to the other party, and that if given by the managers the notice should be given in accordance with a resolution of a meeting of managers passed at a meeting called according to certain formalities, and, further, that where such notice by the managers required the consent of the local education authority, it should be sufficient if it were confirmed by such authority.

On March 30, 1916, the plaintiff received a notice from the managers of a resolution terminating her appointment at the end of three months from April 1. The grounds for the dismissal were not stated. It was admitted that this notice and the resolution complied with all the formalities required by the agreement.

Sect. 7, sub-s. 1 (c), of the Education Act, 1902, provides that in the case of a school not provided by the local education authority the consent of the authority shall be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school. The dismissal in this case was not on any such grounds.

Upon receipt of the notice the plaintiff wrote to the local education

authority asking whether her dismissal had been approved by them. On April 20 she received an answer from them that the matter had not yet come before them, and on June 6 a further answer enclosing the copy of a resolution that, having regard to the decision of the High Court in *Young v. Cuthbert* (1), the local education authority were of opinion that they had no power to interfere in the matter.

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The plaintiff then commenced this action against the managers for an injunction restraining them from proceeding on their resolution to dismiss her until the consent of the local education authority had been obtained and she had had an opportunity of being heard in her defence against any charges made against her.

Upon motion for an injunction on June 23 Astbury J. directed the motion to stand over for a fortnight in order that it might be ascertained whether the local education authority confirmed the dismissal, and on July 7 the motion was renewed, the local education authority having in the meantime by letter to the managers confirmed the plaintiff's dismissal.

Astbury J. refused the motion on the ground that the parties were bound by their own agreement to accept confirmation by the local education authority as a sufficient consent within the Act, and that neither the agreement nor the Act required that the local education authority should hear the plaintiff before confirming her dismissal.

The plaintiff appealed, and the appeal was heard on July 25 and 26, 1916.

*Hon. Frank Russell, K.C.*, and *H. Lynn*, for the plaintiff. There was not a mere contract of service between the plaintiff and the managers; she had in addition, by virtue of s. 7 of the Education Act, 1902, a status which cannot be terminated by the managers unless and until the requirements of the Act are complied with: *Smith v. MacNally* (2), which, we submit, is at variance with, and is to be preferred to, *Young v. Cuthbert*. (1) Sect. 7 is a statutory enactment out of which the parties cannot contract themselves, and before the consent of the local education authority is given the plaintiff has a right to be heard in her own defence. She has never yet heard, nor does she know, what are the grounds for her dismissal. The consent

(1) [1906] 1 Ch. 451.

(2) [1912] 1 Ch. 816.



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BLANCHARD Further, we submit that, quite apart from any statute, if a contract is of such a nature that an employee cannot be dismissed without the consent of a third party, the consent of that third party is a provision for the protection of the servant and invests the third party with a quasi-judicial capacity, and before the servant is dismissed he has at least a right to be heard. Such a contract cannot be determined as the defendants have endeavoured to determine it in this case.

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*Jenkins, K.C.*, and *Fairfax Luxmoore*, for the defendants, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from the decision of Astbury J. in which, as I rather gathered from the opening, we were to have the pleasant or the unpleasant task of saying whether Warrington J. was right or Buckley J. was right. In my view we have nothing to do with either of those cases, and I do not propose to express any opinion as to which is the better view of the section. In my opinion this case turns upon the terms of the contract between the parties and also upon a few words in the Act of 1902.

In the first place this is a non-provided school ; it is a school which comes under s. 7, by which, stating it very shortly, the local education authority shall maintain and keep efficient all public elementary schools within their area and have the control of all expenditure required for that purpose except expenditure for which under the Act provision is to be made by the managers. Then come special stipulations as to the case of non-provided schools. Clause (a), which I shall not read at length, says that the managers shall carry out any directions of the local education authority as to the secular instruction, including any directions with respect to the qualifications of the teachers, and if the managers fail to carry out those directions the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction as if they were the managers, but no direction given under that provision shall be such as to interfere with reasonable facilities for religious instruction during school hours. Then clause (b) gives

power to inspect the school, and clause (c), which is the most important one for the present purpose, provides that the consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds—that is, for the appointment of the teacher—and the local authority cannot object to the appointment by the managers of a teacher on the ground that they do not like the religious views of the teacher. Then the clause goes on to say that the consent of the authority shall also be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school. If dismissal is on the ground of religious instruction in the school, then there is no protection whatever to the teachers and the authority have nothing to do with it; the teacher is at the absolute and sole mercy of the managers.

That being the state of things, a contract in writing was entered into which is dated May 16, 1913, and made between the managers of the Church of England school at Albourne of the one part and the plaintiff, Mrs. Blanchard, of the other part. Clause 1 says that the teacher shall teach and serve as teacher in accordance with the requirements of the Board of Education and under the direction as to secular instruction of the local education authority and subject thereto under the direction of the managers. Then the salary is fixed at 100*l.* per annum, which is to be made payable not by the managers but by the local education authority. Paragraph 4 is not important, and paragraph 5 deals with the question of religious instruction in the school, with which we have nothing to do here. Then paragraph 6 contains this clause: “This agreement may be terminated at any time by either of the parties hereto on giving to the other of them three calendar months’ previous notice in writing to that effect and if such notice be given by the managers it shall be given in accordance with the decision of a meeting convened by notice sent to every manager four days at least before the meeting stating that the termination of the agreement with the teacher will form part of the business of such meeting and the notice of termination shall be signed by the chairman or in the absence of the chairman by the presiding chairman on their behalf.” It is not disputed that there was a meeting of the managers which did pass a resolution to terminate the plaintiff’s services at the end of three months. Then

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clause 7 says this : " When such notice by the managers requires the consent of the local education authority it shall be sufficient if such notice be confirmed by that authority ; when it is given by the direction of that authority the notice shall state on the face of it that it was given by such direction and when the notice is given by the managers on the grounds connected with the giving of religious instruction in the school these grounds shall in like manner appear on the face of the notice." Then there is provision for the service of the notice, and then comes clause 9 : " The managers shall forthwith inform the local education authority of any notice of termination given by them without the previous consent or direction of such authority and the grounds thereof."

What does that agreement, taken as a whole, say ? That the engagement can be terminated by three months' notice on either side. That has been done here. If it is not terminated on religious grounds but on what I will call by way of distinction secular grounds, then either the prior consent or the subsequent confirmation of the education authority must be obtained. Clause 9 seems to me to be important. It is a sort of protection to the teacher that the managers must inform the education authority of the notice of termination which they have given and the grounds thereof. That is the only thing which, according to the terms of the agreement, requires to be done, namely, to inform the local authority that they have given the notice and inform them of the grounds thereof. It is admitted that the managers did inform the local authority of the notice and of the grounds of the termination of the agreement. What more was required ?

It is said that the education authority were in a judicial or quasi-judicial position and had no power to give their prior consent or subsequent confirmation without acting in a judicial character, or at least having the plaintiff before them and hearing what she had to say. This is not a case in which any complaint is made against this lady. We do not know what it is, but nobody suggests misconduct against her ; a word of that kind is not breathed anywhere. If a few of the managers—or I will assume if the managers unanimously—said " We do not think it is in the interest of the school that this lady should be continued," not because of misconduct, but, suppose, on account of her age, or anything which is not misconduct, I myself

see no ground for saying that there is any obligation on the education authority to consider the grounds upon which the managers have acted, and if that is done and the education authority then give their prior consent or their subsequent confirmation, all that the law requires from them has been complied with.

In my opinion the view of the position of the schoolmistress in this non-provided school which has been taken by the learned counsel for the appellant is one for which there is no foundation, assuming, as I do, good faith on the part of the managers and on the part of the education authority ; and good faith has not been challenged, and could not be challenged, here. For these reasons I see no ground for the plaintiff's contention ; she has the protection of the Act of Parliament which she is entitled to have, and I think this appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. I do not think it necessary to consider the divergent views expressed by the learned judges in the two cases to which we have been referred. I shall assume that the plaintiff has a right to take advantage of a failure on the part of the managers to fulfil the provisions of the statute. In *Smith v. MacNally* (1) the managers had not obtained the consent of the education authority. They had purported to terminate the agreement on religious grounds, and the learned judge found that the grounds on which they had acted were not religious grounds within the meaning of this statute. They therefore had done something which they had no power to do under the circumstances, because they had acted without the authority which is required by the statute. It may be that the plaintiff might be entitled (I do not say whether it is so or not) to take advantage of that by saying "You have purported to dismiss me, but, looking at the statute, you have not, under the circumstances, power to dismiss me ; your act, therefore, is a nullity, and being a nullity I am entitled to say that I am still a mistress." It is quite possible that is right, but that is a very long way from this.

In this case the managers have obtained the consent of the education authority, and all that is said is that the mistress is entitled to say that that consent shall not be given until she has been heard

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because "It is a consent for my protection and I am entitled to say that I will not have a charge made against me, or my status of schoolmistress taken from me, without being heard." The word "status," it has been pointed out, was used by Warrington J. as repeating the argument of counsel and not as his own expression. But when you look at the statute I cannot see any foundation for the contention that it requires the education authority to hear the schoolmaster or schoolmistress before consenting to the termination of an engagement in accordance with the terms of that agreement. This is spoken of as dismissal: it is so in a sense, but it is not dismissal in the sense in which that word is ordinarily used, namely, dismissal on the ground of misconduct. It is a termination of the engagement in accordance with the terms of the agreement, but that termination requires the sanction of the education authority.

It seems to me that, although the provisions of the section may operate as a protection to the master or mistress, it is pretty clear, looking at the statute, that they were not inserted with a view to the teacher's interests; they were inserted with a view to the interests, if I may call them so, of the education authority. There are two kinds of instruction given in the schools. One is non-denominational religious instruction, and the other is what is called, in s. 4 of the Act, religious instruction, which, if it is given, is to be given otherwise than at the cost of the education authority. The rest of the education is given at the expense of the education authority as provided for by s. 7, and the restriction upon the powers of the managers to terminate an agreement appears in a sub-section to s. 7. The education authority are only to maintain the school so long as certain conditions and provisions are complied with, and one of the conditions and provisions that must be fulfilled in order that they may maintain the school is that the consent of the education authority shall also be required to the dismissal of a teacher, unless the dismissal be connected with the giving of religious instruction in the school. If the teacher is to be protected, there is no reason why he or she should not be protected against dismissal on the grounds connected with the giving of religious instruction just as much as on any other grounds; but if this provision is inserted for the protection, so to speak, of the local education authority, there is every reason for it; and so it is provided that the education is to be at their cost and

expense and that it shall not be interfered with without their consent. Where, on the other hand, the instruction is religious instruction which is not given at their cost and expense, there they have nothing to do with the termination of the agreement. That seems to me to point pretty clearly to the real reason why these provisions as to education, for which the education authority are responsible and for which they pay, shall not be interfered with without their consent. In that case I can see nothing to make them a judicial body: they are not investigating charges against the lady; they are only seeing that the interests of the education which is provided by them shall not be interfered with without their consent. I can see nothing judicial in those functions, and no provision pointing in favour of the teacher which requires a hearing of him or her by the education authority before they give their consent. Upon those grounds I think Astbury J. was right and that this appeal should be dismissed.

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WARRINGTON L.J. I am of the same opinion. I will assume for the present purpose that the plaintiff is entitled to such protection as is given to her by the necessity of obtaining the consent of the local education authority, but, assuming this, I am unable to go further and to say that she has the right to be heard by the authority before their consent is given.

So far as the agreement is concerned, it must be borne in mind that under that the managers may at any time terminate the engagement at their own will. The only provision contained in the agreement which in this respect appears to have been inserted for the protection of the plaintiff is that contained in clause 9, which requires that the managers shall forthwith inform the education authority of any notice of termination given by them without the previous consent or direction of such authority and the grounds thereof. That is the only protection which the agreement gives in this respect.

Then, so far as the statute is concerned, it must be borne in mind that all that is required is the consent of the authority. The authority has no power to appoint or dismiss or terminate the engagement; the power of terminating the engagement rests with the managers, and all that is required is that that power shall be exercised with the consent of the local education authority. In determining whether

C. A. they shall give that consent or not there is nothing, in my opinion,  
 1916 in the statute which compels the local education authority to ascer-  
 BLANCHARD tain in any way whether the grounds alleged by the managers are  
 v. well founded or not. It seems to me that it is left entirely in the dis-  
 DUNLOP. cretion of the local education authority to say whether they will or  
 Warrington L.J. will not consent to the termination of the engagement. Upon those  
 grounds I think the appeal fails.

Solicitors: *Baker & Nairne; Rooks, Spiers, Wales & Ward, for Henry Cane, Brighton.*

R. M.

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*In re* GLIDDON.

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[1916 G. 949.]

*Will—Construction—Bequest of “all my monies”—Residuary Personal Estate.*

Testatrix by her will bequeathed to her brother E. J. G. and her niece G. M. S. “all my monies to be equally divided between them and to the aforesaid G. M. S. all my household furniture and personal effects.” At the date of the will the testatrix had at her bank 32*l.* 10*s.* 7*d.* and was possessed of certain furniture and effects of a value not exceeding 20*s.* She was also entitled to a moiety of a reversionary interest in certain investments amounting to 2430*l.* which was subject to a mortgage for 750*l.* :—

*Held*, that there was no sufficient context in the will to show that the testatrix had used the words “all my monies” otherwise than in their ordinary legal sense, and consequently that the gift of them did not constitute a residuary bequest of her personal estate so as to pass the reversionary interest.

*Lowe v. Thomas* (1854) 5 D. M. & G. 315 followed. *In re Skillen* [1916] 1 Ch. 518 distinguished.

#### ADJOURNED SUMMONS.

Hannah Eliza Gliddon made her will, dated May 20, 1912, in the following words: “I hereby revoke all wills made by me at any time heretofore. I appoint my brother Edwin John Gliddon of 13 Boundary Road, Walthamstow, to be my executor, and I direct that all my debts and funeral expenses shall be paid as soon

as conveniently may be after my decease. I give and bequeath unto my brother Edwin John Gliddon and my niece Grace May Smith all my monies to be equally divided between them and to the aforesaid Grace May Smith all my household furniture and effects."

The testatrix died on May 22, 1912, two days after making her will.

At the date of her will the testatrix had at her bank the sum of 32*l.* 10*s.* 7*d.* and was possessed of certain furniture and effects of trivial value not exceeding 20*s.* She was also entitled under the will and codicils of Matilda Easton to a moiety of a reversionary interest expectant on the death of Ann Dorothy France in certain investments amounting to 2430*l.*, and on that reversionary interest she had with her sister Florence Matilda Williams, who was entitled to the other moiety, raised by mortgage a sum of 750*l.* The money standing to her credit at the bank when she made her will represented the undisposed of residue of her share of the money so raised.

On May 21, 1912, the day after she made her will, the testatrix drew out of the bank 30*l.* 15*s.* 11*d.* for the purpose of meeting the expenses connected with her illness and the like. In consequence, at the date of her death only 1*l.* 14*s.* 8*d.* stood to the credit of her account there.

On December 1, 1913, E. J. Gliddon, the executor named in the will, died.

On May 1, 1915, Ann Dorothy France died, and the reversionary interest thereupon fell into possession.

This was an originating summons taken out by Grace May Smith for the determination of the question whether the gift in the will of "all my monies" constituted a residuary bequest of the testatrix's personal estate so as to pass the reversionary interest.

*E. S. Cox-Sinclair*, for the plaintiff. It is submitted that the whole of the testatrix's personal estate, including the reversionary interest, passed under the gift of "all my monies." The case is covered by *In re Cadogan* (1), where the whole personal estate was

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held to pass under a gift of "one-half of the money of which I am possessed" to A. "and the remainder to" B.

*J. W. Manning*, for Florence Matilda Williams, representing the statutory next of kin of the testatrix. The testatrix cannot have intended that the gift of "all my monies" should pass the whole of her personal estate, because she subsequently disposes of her household furniture and effects. She has here made two specific bequests, one of her moneys and the other of her household furniture and effects. The case is governed by *Lowe v. Thomas*. (1) The latest decision on the point is *In re Skillen* (2), in which Sargant J. held that a gift of "my money" followed by a gift of "all my personal property in the house of either of my nieces . . . at the time of my death" passed the whole of the residuary personal estate. That decision, however, proceeded on the construction placed by the learned judge on the last mentioned words, which he treated, not as being an independent gift, but as being merely a qualification of the previous gift. His reasoning shows that but for this he would have felt himself bound by *Lowe v. Thomas*. (1) This is therefore a case in which there are two specific bequests and no context to suggest that testatrix used the word "monies" otherwise than in its ordinary legal sense. In *In re Buller* (3) Stirling J. expressed some doubts as to the correctness of *In re Cadogan*. (4)

*T. Hynes*, for the administratrix of Edwin John Gliddon. The gift of "all my monies" is a residuary gift. The testatrix has used the word "monies" in its popular sense as meaning property. A reversionary interest will pass under a gift of "money": *In re Egan* (5); *In re Buller* (3); *In re Pringle*. (6) If this gift of "monies" is not held to be a residuary gift the testatrix will die intestate as to practically the whole of her estate. *In re Cadogan* (4), although it has been commented on by Stirling J. in *In re Buller* (3), has never been overruled. The amount of money in the bank was so small that it can hardly be supposed that the testatrix intended to make it the subject of a separate gift.

(1) 5 D. M. & G. 315.

(2) [1916] 1 Ch. 518.

(3) (1896) 74 L. T. 406, 409.

(4) 25 Ch. D. 154.

(5) [1899] 1 Ch. 688.

(6) (1881) 17 Ch. D. 819.

*E. S. Cox-Sinclair*, for the plaintiff, adopted the same argument. YOUNGER J.  
*J. W. Manning* in reply.

YOUNGER J. stated the facts and continued: The question is whether there is in this will a sufficient context to enable me to attribute to the words "all my monies" used by the testatrix such a signification comprehensive enough to carry the whole residuary estate, including the reversionary interest. I should not have had much difficulty in deciding that question to my own satisfaction had it not been for authority by which I conceive myself to be bound. But it seems to be clear from the judgments of Knight Bruce and Turner L.JJ. in *Lowe v. Thomas* (1) that a gift of "the whole of my money" followed by a specific bequest of personal property is not sufficient to carry the residue, even in a case where the "money" is settled by the will. Now I cannot find that that decision of the Court of Appeal has ever been questioned, nor can I draw any valid distinction for any relevant purpose between the expression "the whole of my money" in that case and the expression "all my monies" in this. I must accordingly, as it seems to me, interpret this will with full regard to that binding authority.

It is true that in *In re Skillen* (2) Sargant J. was able to escape from *Lowe v. Thomas* (1) on a will where a gift of "my money" was followed by a gift of "all my personal property in the house of either of my two nieces . . . at the time of my death"; but I cannot read his judgment without seeing that the learned judge would have had a difficulty in doing so but for the fact that the gift disposing of the testatrix's personal property in the house of either of her two nieces at the time of her death took the form of an expression of her wish and not that of an out and out gift, so that the Court was able to reach the conclusion that the bequest was really a qualification of a more extensive previous gift raising an implication that property of the kind to which the qualification extended had already been dealt with by the will under the gift of "my money." Here, however, I have no similar context to assist me, for the gift of "all my household furniture and personal effects" in this will is as express, emphatic, and independent as is the gift of "all my monies" which precedes it.

(1) 5 D. M. & G. 315.

(2) [1916] 1 Ch. 518.

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Further, although it is remarkable that the testatrix should have thought it worth while to dispose expressly of so small a sum of cash, nevertheless this is subject to the observation that she did think it worth while to dispose expressly of household furniture and personal effects not worth 20s. In the result, therefore, we find here a simple gift of "all my monies" not either from its position or in its terms residuary, and without any context to enable it to be said with judicial certainty that the testatrix was using those words otherwise than in their ordinary legal signification. Accordingly I think that in this particular will these words are not sufficient to carry more than the money at the bank. The result is that the testatrix has not disposed of her moiety of the reversionary interest which constitutes her entire residue. That moiety can, however, be resorted to for the payment of her debts, funeral and testamentary expenses, and the costs of all parties of this summons, which accordingly I direct shall be taxed as between solicitor and client and paid out of it.

Solicitors : *Francis H. Jennings ; Hancock & Willis, for Jerman & Thomas, Exeter.*

W. I. C.

## COLLINS v. SEDGWICK.

[1916 C. 470.]

PETERSON  
J.

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May 31;  
June 1.

*Company—Purchase Price of Shares—Method of Valuation—“Profits available for distribution as dividend”—Excess Profits Duty—Deduction—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), Part II., s. 35; Part III.*

Under the articles of association of a private company there was to be no free market in respect of the ordinary shares of the company so long as a purchaser selected by the board was willing to purchase the same at a fixed value, which was to be determined in manner defined by the articles, being based upon a three years' aggregate of the sums which would have been paid as dividend upon such ordinary shares “if in respect of each of such three years there had been distributed among the members the entire profits of such year available for distribution as dividend” :—

*Held*, that, in ascertaining the fixed value of a share, excess profits duty payable under Part III. of the Finance (No. 2) Act, 1915, must be deducted before the entire profits of any year available for distribution as dividend among the shareholders could be ascertained.

For this purpose excess profits duty is not analogous to income tax. (1)

*Attorney-General v. Ashton Gas Co.* [1904] 2 Ch. 621 (affirmed [1906] A. C. 10) and *Johnston v. Chestergate Hat Manufacturing Co.* [1915] 2 Ch. 338 distinguished.

## ADJOURNED SUMMONS.

The articles of association of a private company relating to the transfer and transmission of shares provided by article 18 that (with certain immaterial exceptions) no ordinary share should without the previous consent of the board be transferred to any other person so long as any person selected by the board as a desirable transferee of the share was willing to purchase the same at the fixed value as thereafter defined. Article 19 provided that the proposing transferor should give a transfer notice to the company of his desire to transfer any such share, which notice should constitute an offer by him to sell the share to any person selected as aforesaid at the fixed value.

Article 21 provided as follows : “The fixed value of an ordinary share for the purpose of article 19 shall be determined as follows, namely : There shall be ascertained what aggregate sum would in

(1) See p. 187, post.



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respect of the three completed financial years of the company last preceding the giving of the transfer notice have been paid as dividend on such ordinary share, if such share has throughout such period been held by a manager as defined by article 33, and if in respect of each of such three years there had been distributed among the members the entire profits of such year available for distribution as dividend without any sums thereout being either carried forward or carried to any reserve account or other similar account, and the fixed value of the share shall be a sum equal to one-half of the aggregate so ascertained plus such sum (if any) in respect of profits of the then current year not being a fraction of one month to the date of the giving of the transfer notice as the auditor of the company shall consider fair."

The plaintiff was desirous of selling ordinary shares of the company held by him, and took out this summons to have the question determined whether in ascertaining the fixed value under article 21 a deduction should be made from the profits of the company for the financial year ending on June 30, 1915, of the amount of excess profits duty payable under Part III. of the Finance (No. 2) Act, 1915 (1), in order to arrive at the entire profits of that year available for distribution as dividend.

*Douglas Hogg*, for the plaintiff. Excess profits duty is part of the profits, and no deduction should be made in respect of it when

(1) The material provisions of Part III. are as follows :—

Sect. 38, sub-s. 1 : "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the fourth day of August nineteen hundred and fourteen, and before the first day of July nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act]referred

to as 'excess profits duty') of an amount equal to fifty per cent. of that excess."

Sect. 45, sub-s. 2 : "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business. . . ."

Sub-s. 3 : "The amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed. . . ."

ascertaining the entire profits of a year available for distribution as dividend in manner contemplated by article 21. It is a duty charged and levied upon the profits: Finance (No. 2) Act, 1915, s. 38, sub-s. 1; s. 40; s. 44, sub-s. 1; s. 45, sub-s. 2.

It was decided in *Johnston v. Chestergate Hat Manufacturing Co.* (1) that income tax was part of the net profits available for dividends, and I submit that there is no distinction in principle between that case and this—between income tax and excess profits duty. “The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves”: per Buckley J. in *Attorney-General v. Ashton Gas Co.* (2), approved by the Court of Appeal and quoted by Sargant J. in *Johnston v. Chestergate Hat Manufacturing Co.* (1) The real test is whether the duty is something which is part of the profits or something which is to be deducted before the profits are ascertained. It cannot make any difference whether the Revenue takes a proportion of the profits by way of income tax or by way of excess profits duty, and if that is so, then *Johnston v. Chestergate Hat Manufacturing Co.* (1) concludes this case.

*Ashworth James*, for the defendants. Income tax and excess profits duty stand on an entirely different footing. The duty is a charge upon the excess profits ascertained as provided by s. 38, sub-s. 1. I admit that if this were a case of income tax I could not claim deduction, and that income tax is part of a shareholder's dividend. That clearly appears from Buckley J.'s judgment in *Attorney-General v. Ashton Gas Co.* (3) Income tax is paid on behalf of the shareholder, who does not then have to pay it himself, and if he is not liable for income tax he can recover it from the Revenue. But excess profits duty is an actual charge upon the excess profits under s. 38, sub-s. 1, and is an outgoing payable by the company. It is in fact a licence duty payable in war-time to the Government, and is recoverable as a Crown debt by virtue of s. 45, sub-s. 3.

(1) [1915] 2 Ch. 338.

affirmed [1906] A. C. 10.

(2) [1904] 2 Ch. 621, 624;

(3) [1904] 2 Ch. 621, 623.

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Unlike the payment of income tax by the company, the payment of excess profits duty does not relieve the shareholder from any liability whatever, and if his annual income is only 100*l.* he cannot recover from the Revenue anything in respect of the duty.

Under these articles nothing is capable of being distributed to a shareholder unless it is a sum which might be payable to him as dividend. This duty is an ordinary annual outgoing and cannot be a sum available for the distribution of income or dividend within the meaning of article 21.

Sect. 35, sub-s. 1, of the Act (1) illustrates the distinction between this duty and income tax, for it provides that the sum paid for excess profits duty may for the purpose of income tax be deducted in computing the profits and gains for the year. The duty is a debt to the Crown payable in cash, and is no part of the profits available for distribution as dividend.

*Douglas Hogg* in reply. The object of article 21 is to ascertain what is the fair price for the shares, and to do that the earning capacity has to be ascertained.

If income tax is part of the profits, I submit that it follows that excess profits duty is part of the profits; and that being so, this case falls within the principle of the decision in *Johnston v. Chester-gate Hat Manufacturing Co.* (2)

PETERSON J. The short question in this case is what is the effect of certain articles of association of the company having regard to the sections of the Finance (No. 2) Act, 1915, which impose excess profits duty. Under articles which are headed "Transfer and Transmission of Shares," beginning with article 18, there is a provision under which ordinary shares have to be offered to various persons, so that there is not what is known as a free market. The way in which the value of the shares for the purposes of article 19

(1) Sect. 35, sub-s. 1, provides as follows: "Where any person has paid excess profits duty under this Act the amount so paid shall be allowed as a deduction for the purpose of income tax in computing the profits and gains of the year which included the end of the accounting period in respect

of which the excess profits duty has been paid; but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received."

(2) [1915] 2 Ch. 338.

is to be determined is defined by article 21, under which the question arises. Article 21 says this: [His Lordship read article 21 and continued:] Therefore in determining the value of the shares the test is what would have been the aggregate amount of the dividends paid on the ordinary shares for the three preceding years if the entire profits of the year available for distribution as dividend had been in fact distributed. The question therefore really is in this case what is the total amount for the three years in question of the entire profits available for distribution as dividend without sums being carried to reserve account or to a similar account.

Sub-s. 1 of s. 38 of the Finance (No. 2) Act, 1915, provides that there shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which Part III. of the Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded by more than 200% the pre-war standard of profits as defined for the purposes of that Part of the Act, a duty (in the Act referred to as "excess profits duty") of an amount equal to 50 per cent. of that excess. It is therefore a duty amounting to 50 per cent. of the excess of the profits arising in a particular year—an excess over the pre-war standard. Sect. 45, sub-s. 2, provides that the duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, and sub-s. 3 of the same section provides that the amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed.

Sect. 35, which is a section inserted before Part III., which deals with "excess profits duty," provides in effect that in estimating the profits on which income tax is to be charged an allowance must be made for the amount which has been paid in respect of excess profits, which are not for that purpose to be included as part of the profits.

Whether this is a charge of a duty on profits or whether it is a debt that is measured by the amount of the profits, the same result, to my mind, is reached. If it be merely a debt that is measured by part of the profits, the result is that it is an annual payment which will have to be paid out of the revenue of the company and, therefore, will have to be deducted before you arrive at profits which

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PETERSON J. 1916 COLLINS v. SEDGWICK. can be divided among the shareholders. If it is a debt which is payable out of the profits, it is again an annual debt, a liability to a third party, which is payable to a third party, the Crown, not as dividend, but as debt, with the result that there is only the balance of the profits after providing for the debt which is available for distribution amongst the shareholders. The result, therefore, is, to my mind, that in no case can it be said that the entire profits of the business, including the amount of the revenue which would have to be attributed to payment of the excess profits duty, are profits available for distribution as dividend.

It is said, however, that there are two cases which preclude me from coming to that conclusion. One is *Attorney-General v. Ashton Gas Co.* (1) and the other a case before Sargant J. of *Johnston v. Chestergate Hat Manufacturing Co.* (2) Each of those cases was a case of income tax. *Attorney-General v. Ashton Gas Co.* (1) was this case: It was provided by a special Act of the gas company that the profits divisible in any year amongst the ordinary shareholders should not exceed 10 per cent., and the question was whether in calculating the rate of dividend for the purpose of the Act income tax ought or ought not to be included. What Buckley J. said was this (3): "The point is the simplest possible, and, but for the fact that some provisions of the Income Tax Acts have to be considered, and that these Acts are not always easy of construction, I should have thought it incapable of the amount of argument which it has received. The obvious solution seems to be that when the company pays, say, 10 per cent., free of income tax, it gives the shareholder 10 per cent., and relieves him from liability to make any payment to the Revenue or allowance to the company out of it. In other words, he receives 10 per cent., and an indemnity against a liability to pay part of it to the Revenue, or allow a deduction by the company of such part as the company has paid to the Revenue for income tax. He thus gets more than a 10 per cent. dividend. Further, if he be a person of limited income entitled to remission or abatement of income tax, he will in fact receive 10 per cent., and the income tax, or so much of the income tax as he reclaims from the Revenue authorities." Further on in his judgment he

(1) [1904] 2 Ch. 621; [1906] A. C. 10.

(2) [1915] 2 Ch. 338.

(3) [1904] 2 Ch. 623.

says this : " The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." Romer L.J. said this in the Court of Appeal (1) : " If such a company as we have to deal with pays income tax on its profits, the income tax, as has been pointed out, is payable out of the profits, and is part of the profits ; and if the profits, after deducting the income tax, have subsequently to be distributed amongst the members of the company, that income tax is not payable again by those members so far as they receive their share of the profits, because the income tax is to be taken as having been paid out of their profits, and on their behalf." The result, therefore, was that, so far as income tax is concerned, the Court came to the conclusion that when the company in fact pays income tax it pays income tax, and is to be treated as paying income tax, on behalf of and on the part of the shareholder, thus relieving the shareholder from the liability to the income tax to that extent. The shareholder in fact gets not only the dividend which he actually receives, but also what Buckley J. described as an indemnity against liability to pay income tax ; in other words, he in fact gets an increase in his dividend, and therefore the whole of the profits, which were in fact applied in paying the income tax for and on behalf of the shareholder, or applied for the purpose of the distribution as dividend, were profits that were distributable as dividend among the shareholders.

In the case of *Johnston v. Chestergate Hat Manufacturing Co.* (2), before Sargant J., the question was this : " By a clause in an agreement between a company and its manager he was to receive a fixed salary, and also, as soon as the profits for the year had been ascertained and certified by the company's auditors, a percentage of ' the net profits (if any) of the company for the whole year.' The agreement provided as follows : ' For the purposes of this clause the words " net profits " shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries,' and other items, which did not include

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(1) [1904] 2 Ch. 629.

(2) [1915] 2 Ch. 338.

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certain items which would be deducted before arriving at the net profits or the income tax payable by the company." It was held, following *Attorney-General v. Ashton Gas Co.* (1), that the income tax was part of the net profits available for dividends, and that the manager was entitled to be paid his percentage on the net profits before deduction of the tax. Sargant J. quotes from the judgment of Buckley J. and says this (2): "But, for the purpose of considering the strict way in which any such burden falls, it seems to me that I must consider that any sum which is paid by the company on behalf of the shareholders of that company by way of income tax, under the system under which income tax is deducted at the source, is part of the net profits of the company available for dividend."

The decision in each of these cases, therefore, proceeds entirely on the view that income tax is paid by the company on behalf of the shareholders, and therefore is a sum that must be included for the purposes of the Act, or the agreement in question, in the net profits which in fact were available for distribution as dividend among the shareholders. But in this case it appears to me that the position is very different. In this case there is a duty imposed for which the shareholder is in no way responsible; it is a duty imposed on the person or company which carries on the business, and from that person or company the duty is recoverable as a debt. There is no liability on the part of a shareholder as in the case of income tax. The shareholder has nothing whatever to do with the payment of the duty. It is the company that has to pay the duty.

It seems to me, therefore, that it is in accordance with common sense and also in accordance with the Act itself that I should hold, as I do, that excess profits duty which is payable under Part III. of the Finance (No. 2) Act, 1915, must be deducted before the profit available for distribution as dividend among the shareholders can be ascertained.

Solicitors: *W. G. A. Edwards; Waltons & Co.*

(1) [1904] 2 Ch. 621; [1906] A. C. 10.

(2) [1915] 2 Ch. 344.

R. M.

## WILLIAM HOLLINS &amp; CO., LIMITED v. PAGET.

EVE J.

[1916 W. 2131.]

1916

Dec. 6, 14.

*Company—Agreement—Construction—Manager—Salary—Commission—Excess Profits Duty—Deduction—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), ss. 38, 40—Finance Act, 1916 (6 & 7 Geo. 5, c. 24), ss. 45, 48, 49—Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), Part II.*

By an agreement of service made in 1913 between a company and its manager it was provided that whenever the profits of the company made during the financial year were more than sufficient to pay the preference dividends, and also a dividend of 7 per cent. on the ordinary shares, the manager, in addition to his fixed salary, should be paid by way of commission a sum equal to 5 per cent. of the excess. The company made excess profits within the meaning of the agreement.

Upon a summons raising the question whether, before ascertaining such excess, the company was or was not entitled to deduct the excess profits duty payable under the Finance (No. 2) Act, 1915, and the Finance Act, 1916:—

*Held*, that the excess profits duty was a contribution to the Exchequer of a proportion of the company's profits standing on much the same footing as the income tax, and ought not to be deducted before ascertaining the excess profits on which the manager's commission was to be calculated.

## ADJOURNED SUMMONS.

The plaintiffs were hosiery spinners and manufacturers of certain fabrics, and carried on business at Pleasley Works, Mansfield, in the county of Nottingham. The defendant, Edgar Lyon Paget, was one of their managers. The capital of the company was 800,000*l.* divided into 400,000 ordinary shares of 1*l.* each and 400,000 cumulative 5 per cent. preference shares of 1*l.* each: 360,000*l.* had been issued in preference shares and 382,500*l.* in ordinary shares.

By an agreement dated February 28, 1913, and made between the plaintiff company and the defendant as their manager, it was provided as follows:—

Clause 4: "There shall be paid by the company to the manager by way of salary such a sum as, with any fees he may receive as a director of the company, shall amount to 850*l.* per annum. Such



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salary shall commence from March 10, 1913, and shall be payable monthly."

Clause 5: "Whenever the profits of the company made during the financial year, or other period comprised in the accounts submitted to an ordinary general meeting of the company in each year, are more than sufficient to pay the preference dividends to the close of such year, or other period, and also to pay a dividend on the ordinary paid-up capital of the company for such year, or other period, at the rate of 7 per cent. per annum, the manager, in addition to his salary aforesaid, shall be paid by way of commission a sum equal to 5 per cent. of the excess. Preference dividends in this clause include the dividends on all shares ranking as regards dividend in priority to the ordinary shares."

There was evidence from the affidavit of the secretary to the plaintiff company that a sum of 44,775*l.* per annum was necessary to pay the dividends upon the preference shares and a dividend of 7 per cent. upon the ordinary shares. The business accounts of the company were made up to November 28 in each year. For the year ending November 27, 1915, the company made profits substantially in excess of the pre-war standard of profits as defined for the purpose of Part III. of the Finance (No. 2) Act, 1915, with the result that a claim for excess profits duty under that Act had arisen.

On October 26, 1916, an originating summons was issued by the plaintiff company to have it determined whether, upon the true construction of the agreement, the amount payable by the plaintiff company for excess profits duty in respect of any financial year, or other period, ought or ought not to be deducted from the profits made by the plaintiff company for that year for the purpose of ascertaining the sum upon which the commission of the defendant under the agreement was to be calculated.

*Clayton, K.C.*, and *G. R. Northcote*, for the plaintiffs. The question raised turns upon the construction of the agreement and of the Finance Acts, 1915 and 1916. It is a representative action to determine the scale of payment of commission as between the company and its managers. We submit that excess profits duty stands upon a different footing from income tax, and that this

duty should be deducted by the company each year before ascertaining the excess upon which the defendant's commission is paid. This new duty is payable under s. 38 of the Finance (No. 2) Act, 1915 (1), and amounts to 50 per cent. of that excess under that Act, but by the Finance Act, 1916, s. 45, it is increased to 60 per cent. By the agreement it is made a condition precedent to the manager getting his commission at all that there should be a sum derived from profits sufficient to pay the preference dividend and 7 per cent. on the ordinary shares. There cannot be profits available for dividends until this deduction is made. *Johnston v. Chestergate Hat Manufacturing Co.* (2) was a case of the deduction of income tax and does not apply. But *Collins v. Sedgwick* (3) governs the present case. This duty is made a charge upon the company or its business by the very words of s. 38; it is a duty payable by the company according to the machinery provided by the rules in the schedules: Sched. IV. of the Finance (No. 2) Act, 1915.

*Maugham, K.C.*, and *Sheldon*, for the defendant. The agreement was entered into to give an inducement to the manager to increase the profits of the business, and excess profits duty was not in the minds of the parties at all, as it did not exist at that date. Our submission is that the whole of the excess profits over the sum of 44,775*l.* is that on which the managers are entitled to their percentage, and none the less because the Crown claims a portion of that excess profit. If this company had become a controlled establishment under the Munitions of War Act, 1915, Part II., and had made large profits beyond its pre-war standard, only a percentage of that would be allowed, and all the rest would be paid into the Exchequer. It could not be said that the profits made during the year had been altered; the profits remained the

(1) Part III. of the Finance (No. 2) Act, 1915, s. 38, sub-s. 1, provides as follows: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the 4th day of August, 1914, and before the 1st day of July, 1915, exceeded, by

more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to 50 per cent. of that excess."

(2) [1915] 2 Ch. 338.

(3) Ante, 179; 32 Times L. R. 554.

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same, but payment has to be made out of them to the Exchequer in respect of the increased prosperity: r. 5 of Sched. IV. of the Act of 1915. The nature of this excess profits duty appears from s. 48 and s. 49, sub-ss. 1 and 2, of the Finance Act, 1916, which latter section contains provisions as to the fees of directors or managers. In the present case the ascertaining of the commission on the profits must take place before payment of the excess profits duty. It is assimilated to the payment of income tax. The agreement will not work unless it is presupposed that the whole remuneration of the directors is deducted as expenses before the amount of the excess profits can be ascertained. If not, and the duty is also deducted from the excess profits, having regard to s. 49, sub-s. 2, of the Finance Act, 1916, under which excess profits duty may be recovered from a director or manager, the manager might have to pay the duty twice over. This excess profits duty should therefore not be deducted.

*Clayton, K.C.*, in reply.

*Cur. adv. vult.*

Dec. 14. EVE J., after reading clause 5 of the agreement of service dated February 28, 1913, continued: The question raised by this summons is whether, before ascertaining the excess upon which commission is payable to the defendant, the company is or is not entitled to deduct the excess profits duty payable in respect of the financial year, or other period.

The answer, in my opinion, depends on the true character of the excess profits duty: Is it a percentage of the profits of the company's trade or business appropriated for public purposes, or is it a charge or duty imposed on the company which only relates to profits in so far that the amount is determined by ascertaining how much—50 per cent. or 60 per cent., as the case may be—of the company's profits, computed as required by the Acts, amounts to?

The duty was first brought into existence by s. 38, Part III., of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89). Sub-s. 1 of that section is as follows: [His Lordship read the sub-section and continued:] Then s. 39 (which defines the trades and businesses to which the duty applies) includes, it is to be observed, among such businesses the business of "any person taking commissions

in respect of . . . services rendered." The defendant is therefore liable to be assessed to the duty in respect of his remuneration.

Sect. 40, with the Fourth Schedule to the Act, regulates the principles on which profits for the purposes of the Act and for the pre-war standard are respectively to be computed, and ss. 44 and 45 contain provisions for the making of returns and the assessment and collection of the duty. Any attempt to divert extra profits into the pockets of directors and managers is forestalled by clause 5 of Part I. of the Fourth Schedule.

Pausing here, I think, on what I have so far referred to, it would be difficult to express any confident opinion as to the nature of the duty, and, but for subsequent legislation to which I shall in due course direct attention, I do not know that one could legitimately refer for assistance to the Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), which in Part II. provides in terms for the payment into the Exchequer of a share of the excess of the net profits of controlled establishments above a statutory limit thereby imposed. There can be no doubt that under that Act the Exchequer payments are simply payments of part of the profits.

By s. 45, Part III., of the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), the excess profits duty is continued and increased to 60 per cent., and by s. 48 power is given to the Commissioners of Inland Revenue to treat munitions Exchequer payments attributable to the same period and subject-matter as that for which excess profits duty is payable, as a payment on account of excess profits duty, or, if the amount of the munitions Exchequer payments is larger than the amount payable as excess profits duty, as extinguishing the duty for the purposes of collection, and if, in any case, excess profits duty is paid before the munitions Exchequer payments, they may arrange with the Minister of Munitions for the deduction of excess profits duty payments from any sums to be collected in respect of munitions Exchequer payments attributable to the same period and subject-matter, or, if the excess profits duty payments are greater than the amount to be collected for munitions Exchequer payments, for the extinction of the amount to be so collected.

These provisions appear to me so to assimilate munitions Exchequer payments and excess profits duty as to solve any doubts raised by the earlier Act in regard to the nature of the latter duty.

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It is, in my opinion, a contribution to the Exchequer of a proportion of the company's profits, and for the purposes with which I am dealing stands very much on the same footing as the income tax. It ought not, I think, to be deducted before ascertaining the excess profits on which the defendant's commission is to be calculated.

It has been argued that this construction may in certain events give the defendant his commission and yet leave the shareholders without the full dividends specified in clause 5 of the agreement, and that such a result is inconsistent with the clause, and in particular with the expression "more than sufficient to pay." I do not think this argument is sound. The payment of the commission is contingent upon the profits amounting to a sum in excess of the minimum fixed by the clause, but is not, as I construe the clause, contingent upon the shareholders actually receiving these dividends. It is their misfortune if so large a proportion of the profits earned are intercepted by the Exchequer as to leave them to go short of their dividends, but such a result does not, in my opinion, prejudice the defendant's rights.

I think some light is thrown on the matter by s. 49 of the Finance Act, 1916. By sub-s. 2 of that section it is provided that if the Commissioners refuse to allow a deduction in respect of any increase in the remuneration of a director of any business, and the company is required to pay excess profits duty in respect of the disallowed deduction, the company may recover from the director the amount paid by way of excess profits duty in respect of the increase, and the amount so recovered is to be treated as excess profits duty paid by the director and not by the company.

The justification for recovering from the director this proportion of the excess profits duty paid by the company must surely rest on this, that the payment has been made by the company on his behalf, and this can only be the case where his increased remuneration is calculated on the entirety of the excess profits; otherwise, if the excess profits duty is first deducted and his remuneration is calculated only on the balance of excess profits, the company would, in effect, under this section be recovering from the director a payment not made on his behalf, and he would be charged twice over with the duty.

I think, therefore, that the contention of the defendant is right, and I must so decide. The costs having been arranged, it is not necessary for me to deal with these.

Solicitors for both parties : *Field, Roscoe & Co.*

G. M.

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*In re* NATIONAL STANDARD LIFE ASSURANCE  
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[00113 of 1916.]

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*Company—Winding up—Life Assurance Company—Deposit of 20,000l.—Liability of Deposit—Company carrying on other Classes of Business—Costs of Winding up—Deposits by Liquidator as Security for Costs in Actions which he was authorized by the Court to carry on—Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2, sub-ss. 1, 3; s. 3, sub-s. 2.*

The 20,000l. required to be deposited in Court by the Life Assurance Companies Acts, 1870 (33 & 34 Vict. c. 61) and 1872 (35 & 36 Vict. c. 41), and the Assurance Companies Act, 1909, is part of the general assets of the company, and is available for the general costs of the winding up and of deposits made by the liquidator as security for costs in proceedings which he has been authorized by the Court to carry on, so far as the same costs and deposits relate to the business of life assurance for which the deposit was made.

*Seemle*, the deposit would not be liable for costs relating to other businesses carried on by the company, but, the liquidator not asking for any further order, the point was not decided.

THIS corporation was incorporated in the month of January, 1906; its objects were to grant and effect assurances of all kinds (except marine insurance), but the business actually transacted by the company had consisted almost entirely of ordinary and industrial life assurance business.

On June 6, 1916, an order was made by the Court that the company should be wound up, and the applicant was appointed liquidator on August 21, 1916.

The assets of the company comprised a sum of 20,000l. deposited in Court under the Life Assurance Companies Acts, 1870 and 1872,

NEVILLE J. which was now represented by securities of the approximate market value of 12,500*l*.

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This was an application by the liquidator in the winding up proceedings for the determination by the Court of the question whether the securities in Court representing the sum of 20,000*l*. deposited upon the registration of the above-named company, pursuant to the Life Assurance Companies Acts, 1870 and 1872, formed part of the general assets of the company so as to be available for (1.) the general costs of the winding up, including the getting in of the general assets of the company other than the said deposit of 20,000*l*. ; (2.) moneys paid or payable into Court by way of security for costs in pending actions by the company in which the liquidator had been duly authorized by the Court to proceed.

The answer to these questions depended wholly upon the construction of s. 2, sub-s. 3, and s. 3, sub-s. 2, of the Assurance Companies Act, 1909. This Act repeals, but in substance re-enacts, the provisions of the Life Assurance Acts, 1870 and 1872, under which the deposit was originally made, but it was admitted that for the purpose of this application the position of the deposited fund and the liabilities relating thereto were the same under all the Acts. The question turned upon the sections noted below. (1)

(1) Assurance Companies Act, 1909, s. 2: “(3.) The deposit may be made by the subscribers of the memorandum of association of the company, or any of them, in the name of the proposed company, and, upon the incorporation of the company, shall be deemed to have been made by, and to be part of the assets of, the company, and the registrar shall not issue a certificate of incorporation of the company until the deposit has been made.”

Sect. 3: “(1.) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of

the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

“(2.) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance

*P. F. Wheeler*, for the liquidator, stated the question.

NEVILLE J.

*Fairfax Luxmoore*, for the policy-holders, took a preliminary objection. The Acts of 1870 and 1872 were repealed by the Act of 1909, which provides that a separate fund must be kept for each class of assurance carried on by the company. It is plain that this company did carry on other classes of business, but the facts are not sufficiently before the Court to enable it to decide the question.

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NEVILLE J. I think there is enough to enable me to decide that this deposit is admittedly part of the life assurance fund, and can only be applied to the costs of life assurance business.

*P. F. Wheeler*. The provisions of s. 2, sub-s. 3, and s. 3, sub-ss. 1 and 2, of the Act of 1909 are exactly the same as those of the Act of 1870, except the direction that the deposit "may be made by the subscribers of the memorandum of association of the company, or any of them," and shall "be part of the assets of the company"—these words were added by the Act of 1872; so that the rights of the policy-holders are the same. If they were different the policy-holders could not be affected by the repeal, for all existing rights are preserved by s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

The only protection given by the Act of 1909, or the previous Acts, to policy-holders is that the fund, which includes the deposit, "shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business"; that clearly does not prevent its being liable for the costs of the winding up, for a liability to be wound up is a necessary incident in the life of every company. There is nothing to extend this protection in any of the Acts.

*Fairfax Luxmoore*. I do not think there is any difference between the Act of 1909 and the former Acts, but the case must be decided

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business of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."



NEVILLE J. under the Act of 1909, for the former Acts are repealed and re-enacted, and therefore the case comes under s. 38, sub-s. 1, of the Interpretation Act, 1889, which enacts that in such a case references in any other Act to the provisions repealed shall be construed as references to the provisions re-enacted.

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The forms of account given in the schedules to the Assurance Companies Act, 1909, show that the fund can only be charged with expenses relating to the class of business for which the fund is set apart. In *In re Nelson & Co.* (1) Warrington J., as he then was, apparently held that the fund set apart was general assets of the company subject to a charge in favour of the policy-holders, but if the fund proved deficient the policy-holders had no claim against the general assets; but that case was decided upon a very special and peculiar contract. It cannot be much guide in any other case.

If the company carried on no business except life assurance, it would be bound to make a deposit, but not to have a special fund. In that case I admit the deposit would be liable for the costs of the winding up. But it cannot be liable for any costs caused by other businesses.

*P. F. Wheeler.* My client will be content with an order that the deposit is liable to the costs of the winding up and of the deposits mentioned above, so far as the same relate to the life policy assurance business.

NEVILLE J. The question here is whether the liquidator is entitled to resort to the deposit made by a life assurance company, which was engaged to some extent in carrying on other businesses, in order to satisfy the costs of the liquidation.

The liquidator has only asked for an order, limiting his right to resort to that fund for the costs of the liquidation so far as they have been incurred in respect of the life assurance business; and that of course relieves me from considering the position as between the life assurance business and any other business which may exist.

What I have to decide is whether the effect of the Act of 1909, which repealed the Acts of 1870 and 1872, is to give to the life policy holders a security over the deposited fund equivalent to that of

debenture-holders, to whom a company has conveyed or assigned part or the whole of its property as security for their advances. NEVILLE J.

In such a case the mortgagees are entitled to realize their security for the purpose of satisfying the amount due upon the debentures, and until they are satisfied the costs of the liquidation cannot be thrown upon any of the assets which are subject to their security. Is that the position in which the Legislature intended to place policy-holders in a life assurance company in regard to the 20,000*l.* deposit, which undoubtedly in one sense is a security for the payment of the amount due on the life policies ?

The material parts of the Act of 1909 for this purpose appear to me to be precisely identical with the provisions in the Acts of 1870 and 1872 which are now repealed. The Act of 1909 is the Act which governs the case. [His Lordship read s. 2, sub-s. 3, of the Act of 1909 and continued :] There we have the explicit statement that the deposit paid under the provisions of the Act is to be part of the assets of the company, and, except so far as they are excluded from the general liabilities to which assets of the company are subject, they must remain and be treated as the assets of the company. Then we have a provision, in cases where a company carries on or intends to carry on another assurance business besides that of life assurance, for the maintenance of a fund which is to be part of the separate assurance fund in respect of which the moneys are received by the company. Then comes s. 3, sub-s. 2, upon which I think the whole matter really turns, subject to what I have already said, that we start with the knowledge that the deposit is part of the assets of the company.

What is the position of that fund with reference to the holders of life policies ? [His Lordship read s. 3, sub-s. 2, and continued :]

If the Legislature had intended to put the policy-holders of a particular class with regard to their fund in the position of debenture-holders having a charge given by the company on that particular part of the assets, nothing would have been easier than to have said so. It seems to me that that is not the intention of the Act. The fund of a particular class is to be the security of the policy-holders undoubtedly—but to what extent ?—“ as though it belonged to a company carrying on no other business than assurance business of that class.” Of course, if it belonged to a company carrying on

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NEVILLE J. no other business than assurance business of that class, there is nothing in that provision to exonerate it from bearing the costs of the winding up of the company.

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Then comes a further provision, which I think is explanatory: "and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class." That is to say, as I understand it, that persons who have contracted with the company on a different basis from that of life assurance are not to be entitled to claim payment of their claims out of this fund which is the security of the life policy holders. I cannot see anything in that to prevent the fund being applicable for the purpose of the liquidation of a life assurance company where the company is being wound up.

It seems to me, therefore, that generally speaking the security given is not such a security as to exonerate the fund from the costs of liquidation. It may well be that the incidence of the costs of liquidation may in proper cases be distributed over the different funds representing the different businesses which a particular company carries on, and that some of the costs incurred in a liquidation where a company is carrying on several assurance businesses may not be payable out of the deposit in respect of the life assurance. One has to consider the words at the end of that section: "shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable"; and I can well conceive cases in which part of the costs of the winding up, if those costs were to be paid out of the life assurance fund, would be indirectly, if not directly, applied for purposes other than those of the class of business to which the fund is applicable. But that point is not raised in the present case, because the liquidator is willing to take an order from the Court referring only to the costs of the liquidation so far as they represent the costs of winding up the life assurance business.

I think that with that limitation the answer to the summons must be to the effect that the deposited fund is liable in the costs of the liquidation.

Solicitors: *Close & Co.; Pontifex, Pitt & Johnson.*

J. R. B.

*In re* RENISHAW IRON COMPANY, LIMITED.  
CLAIMS OF STOTHARD AND WILSON.

NEVILLE J.

1916

Nov. 14.

[00143 of 1916.]

*Employer and Workman—Employer insured—Both Insurance Company and Employer in Liquidation—Insurance Company first to go into Liquidation—Right of Proof for Compensation—Liability of Insurance Company—Continued Liability of Employer—Company—Winding up—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5, sub-ss. 1, 2, 3, 5.*

The effect of s. 5 of the Workmen's Compensation Act, 1906, is that, where an employer has entered into a contract with any insurers in respect of any liability under the Act, in the event of the employer becoming bankrupt, or, being a company, having commenced to be wound up, the claim of the workman is against the insurers only, whether in liquidation or not. He has no right to prove in the bankruptcy or liquidation of the employer, except in the case provided for by sub-s. 2, which applies only when the insurance does not cover the whole of the employer's liability. It makes no difference that the insurers have gone into liquidation before the bankruptcy or liquidation of the employer.

*In re Pethick, Dix & Co.* [1915] 1 Ch. 26 followed.

THIS was an originating summons taken out in the winding up of the Renishaw Iron Company, Limited, by Charles Stothard and Job Wilson, two workmen, both of whom had met with accidents during their employment by the company, in respect of which they were entitled to compensation which had been agreed in each case at 1*l.* a week. Wilson's compensation had afterwards by agreement, on his total incapacity for work ceasing, been reduced to 15*s.* Stothard's accident had happened in 1908, Wilson's in 1910.

The company had insured themselves against all liabilities in respect of accidents to their workmen with the Law Car and General Insurance Corporation, and the said weekly sums of 1*l.*, 1*l.*, and 15*s.* were paid by the company and recouped by the corporation until the winding up of the corporation.

The corporation was ordered to be wound up compulsorily on December 20, 1910, and the company put in a proof for 687*l.* 12*s.* 6*d.* in the liquidation of the corporation for claims under their policy; this claim included 350*l.* for their liability to Stothard and 250*l.* for their liability to Wilson, being the estimated amounts required to



NEVILLE J. settle their respective claims. This claim of 687*l.* 12*s.* 6*d.* was afterwards agreed at 500*l.*, but had not been finally dealt with or disposed of.

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On July 21, 1915, a resolution was passed for the voluntary winding up of the company, and a liquidator was duly appointed. Stothard put in a proof for 246*l.* 16*s.* and Wilson for 417*l.* 6*s.* 3*d.*, being their estimates of the respective values of the annuities payable to them respectively, calculated according to the provisions of the said Act.

The liquidator had rejected both proofs on the ground that all the rights of the company against the corporation had vested in the applicants, and that they had no right of proof against the company. No questions as to amount of proof had been decided or discussed.

It was stated that the corporation could not pay a dividend of more than 2*s.* in the pound, while the company was expected to pay a much larger dividend.

The question depended on s. 5, sub-ss. 1 and 2, of the Workmen's Compensation Act, 1906. (1)

*C. Paley Scott*, for the applicants. Sect. 5, sub-ss. 1 and 2, of the Act contemplates that the right of the employer against the insurers is still subsisting; there is nothing in the section to give the workman any right of proof against the insurers or to compel

(1) Workmen's Compensation Act, 1906, s. 5: "(1.) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up

of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

"(2.) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation."

him to accept such proof. *In re Pethick, Dix & Co.* (1) is distinguish- NEVILLE J.  
 able because the liquidation of the employers came before that of  
 the insurance company. The section is intended for the benefit  
 of the workman, and it cannot be that he was intended to have  
 nothing but a worthless remedy against the insurers. Here the  
 liability of the insurers is less than that of the employer.

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*Whinney*, for the Renishaw Iron Company. The Act plainly  
 intended the rights given to the workman against the insurers to  
 be in substitution for the rights he had against the employer, and  
 not to give him an additional or alternative remedy: *Craig v.*  
*Royal Insurance Co.* (2); *In re Pethick, Dix & Co.* (1) In the  
 latter case your Lordship felt that there was some hardship, but  
 held that the words are too clear. No doubt if the amount which  
 the two claimants together could claim against the employers  
 exceeds the sum of 500*l.*, at which the claim against the insurers  
 was agreed, the workmen can prove for the balance. [He also  
 referred to *In re Law Car and General Insurance Corporation.* (3)]

*C. Paley Scott* in reply.

NEVILLE J. I think the case here really depends on the question  
 whether the rights of the employer against the insurer, which are  
 directed to be vested in the workman by s. 5, sub-s. 1, of the Act,  
 include the right of the employer company to prove in the liquida-  
 tion of the insurer company. The insurer company went into liqui-  
 dation, and subsequently the employer company also went into  
 liquidation. Thereupon s. 5, sub-s. 1, of the Act comes into con-  
 sideration, because one of the events mentioned in that section—  
 the winding up of the employer company—has taken place. The  
 section in that event transfers the rights of the employer against  
 the insurers to the workman, where the employer has entered into  
 a contract with any insurers in respect of any liability under the  
 Act to any workman. Is the result of this to transfer to the work-  
 man the right of the employer to prove in the liquidation of the  
 insurers? I am of opinion that it is. It is said, and no doubt truly,  
 that the Act was intended for the benefit of the workman. On the  
 other hand, but for this provision the workman would have no

(1) [1915] 1 Ch. 26.

(2) [1914] W. N. 442; 84 L. J. (K.B.) 333.

(3) [1913] 2 Ch. 103.

NEVILLE J. remedy against the insurers at all, and, where the employer is insolvent, the remedy against the insurers is more beneficial to the workman than any remedy against the employer. Even when the insurers are also insolvent, the right to prove in the liquidation of the insurers is, generally speaking, at least as likely to be beneficial to the workman as proof in the liquidation of the employer. Arguing the matter out, therefore, it would not seem to be contrary to the intention of the statute to hold that the rights of the employer to prove in the liquidation of the insurers are transferred to the workman. Here the claim of the employer in the liquidation of the insurance corporation was compromised for 500*l*. This is the right which s. 5, sub-s. 1, in my opinion transfers to the workmen, and the workmen are entitled to prove for 500*l*. in the liquidation of the insurer corporation. But s. 5, sub-s. 2, says: "If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation." Here the liability of the employers to the workmen is the full amount of their claims. It appears to me, therefore, that in so far as their claims together exceed 500*l*. the workmen are entitled to prove in the liquidation of the employer company, but up to the sum of 500*l*. they can prove only in the liquidation of the insurers.

Solicitors : *Jackson & Jackson, for J. W. Fenoughty, Sheffield ;  
Johnson, Weatherall & Sturt, for Benson, Burdekin & Co., Sheffield.*

J. R. B.

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IRON  
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*In re* KARMELLI & BARNETT, LIMITED.

NEVILLE J.

[00233 of 1916.]

1916  
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Nov. 14.
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Company—Winding up—Practice—Voluntary Liquidation—Insolvent Company—Appointment of Liquidator—Statutory Meeting of Creditors—Objection of Creditors to One of Two Liquidators appointed by Shareholders—Removing Liquidator—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 188.

The object of s. 188 of the Companies (Consolidation) Act, 1908, in providing for a statutory meeting of creditors in a voluntary liquidation is to give the Court an opportunity of carrying out the wishes of the creditors according to its discretion, if they are reasonable, without a petition. In the case of an insolvent company the wishes of creditors should have special weight in the appointment of liquidators. The fact that a liquidator appointed by the shareholders is also receiver for debenture-holders is a reasonable ground for the creditors desiring his removal.

KARMELLI & BARNETT, LIMITED, were registered as a private company on February 21, 1914, with a capital of 6000*l.* divided into 800 preference shares of 5*l.* each and 2000 ordinary shares of 1*l.* each, to acquire and carry on the business of hat factors and hosiers formerly carried on by Mrs. Karmelli and Mr. Barnett; 1000 of the ordinary shares were issued to each of these partners for considerations other than cash, and they were appointed sole directors of the company.

Certain debentures had been issued, and on October 15, 1915, Heiron was appointed receiver in a debenture-holders' action. He was also appointed manager by the Court.

On February 29, 1916, at a meeting of creditors called by the receiver, a resolution was passed requesting the receiver and manager to carry on the business until June and then call another meeting. Another meeting of creditors was called by the receiver on August 24, 1916, and a resolution was unanimously passed that the directors of the company should be requested to call a meeting of the shareholders and pass a resolution for a voluntary winding up with Mordant and Keene as liquidators, and a committee of inspection, and that they should be informed that, failing this being done within fourteen days, the creditors would file a petition for a compulsory winding^g up.

NEVILLE J. These two meetings were called by the receiver as a matter of courtesy, and to let the creditors know what was being done, and not in discharge of his duties as receiver.

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On September 6, 1916, an extraordinary meeting of the shareholders was held and a resolution passed for a voluntary winding up, and Heiron and Keene were appointed liquidators without any committee of inspection.

These liquidators called the statutory meeting of creditors required by the Companies (Consolidation) Act, 1908, s. 188, and at that meeting a resolution was passed by a very large majority that an application should be made to the Court for the removal of Heiron from being liquidator and appointing Mordant as liquidator, jointly with Keene, in his place, and appointing a committee of inspection.

This summons was taken out in the liquidation by one of the creditors, on behalf of all, asking for an order in the terms of the resolution.

Galbraith, for the summons. The shareholders have really no interest in the matter, for the company is hopelessly insolvent. The creditors object to Heiron as a liquidator because he is receiver for the debenture-holders, whose interests may be antagonistic to those of the creditors, and he has been auditor of the company, and has been closely connected with the business of the company and of the firm whose business was taken over by the company in which the old partners are the sole shareholders and directors.

Sect. 188, which was first included in the Act of 1907, was intended to enable the Court to give effect, in a proper case, to the wishes of the creditors without requiring that a petition should be filed for the removal of a liquidator appointed by the shareholders of whom the creditors do not approve.

Given, for the company. The shareholders appointed one of the liquidators whom the creditors desired; it is only fair that they should appoint one person of whom they themselves approve. The fact that Heiron is receiver is no reason against his appointment; it is quite usual to appoint a receiver liquidator, and it is convenient because he knows all the details about the assets. The shareholders object to Mordant because at the creditors' meeting

he made unfounded charges about the management of the company and showed great hostility to the shareholders. If there is any danger of friction the creditors ought to wait until friction arises.

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NEVILLE J. This is an application by creditors for the removal of a liquidator appointed by the shareholders in the voluntary winding up of a company. Questions where there is a dispute as to the persons to act as liquidators always present difficulties, but, without saying there is no exception to this rule, I always, when the question arises in the case of an insolvent company, pay great attention to the wishes of the unsecured creditors. In my opinion in such a case the view of the shareholders of the company who have no pecuniary interest in the assets ought not to be regarded as against the views of the creditors to whom in substance the assets belong, and whose chance of getting as much as possible, or perhaps anything at all, depends on the way in which they are realized. In this case two liquidators were appointed at the meeting at which the resolution for the voluntary winding up of the company was passed, but Heiron, one of the persons appointed to act as liquidator, was the receiver previously appointed in an action brought by the debenture-holders. At the meeting of creditors held in pursuance of s. 188 of the Companies (Consolidation) Act, 1908, the creditors by a very large majority objected to Heiron acting as one of the liquidators. In my opinion, though I believe that some of my brother judges have taken a different view, it is undesirable that a person who is a receiver for debenture-holders should act as a liquidator in the winding up of the company, as the interest of the receiver and liquidator will necessarily be different and in many cases conflicting. Holding this view, I think the objection taken by the creditors to Mr. Heiron's appointment as liquidator is well founded. If the creditors could have shown no reasonable ground for their preference for one liquidator over another, I should have been loth to interfere, as to do so might encourage struggles for the position of liquidator, which I think it is very undesirable that the Court should in any way countenance; but in this case I think that the objection of the creditors was reasonable, and accordingly that I ought to give effect to what I understand to be the underlying intention and object of s. 188, that is, that the Court ought

NEVILLE J. without abandoning its discretion to follow the views expressed
 1916 by the creditors at such meeting. In the circumstances of this
 KARAMELLI case I think that the relief asked for by the summons ought to be
 & BARNETT, granted, and accordingly I appoint Mr. Mordant, who was
 LIMITED, nominated by the creditors, to act as joint liquidator with Mr.
In re. Keene in place of Mr. Heiron. With regard to the question of the
 committee of inspection, I understand that no objection is raised to
 this part of the application, and the persons nominated at the
 creditors' meeting will be appointed to act in that capacity.

The judge directed the costs as between solicitor and client of the
 applicants and of Heiron to be paid out of the assets.

Solicitors : *H. H. Wells & Sons ; Walbrook & Hosken.*

J. R. B.

NEVILLE J.

In re CHURCHILL.

1916
 Nov. 22.

TAYLOR *v.* UNIVERSITY OF MANCHESTER.

[1916 C. 1126.]

*Will—Gift of a Collection of Coins—Imperfect Gift in Testator's Lifetime—
 Codicil revoking Gift—Erroneous Assumption of Fact—Revocation,
 whether conditional or absolute.*

A testator by his will made in 1901 gave all his coins with the
 cabinets in which they were placed to a university. In January,
 1912, he by letter presented his "collection of coins" with the
 cabinets to the university on certain conditions, and they accepted
 the gift and conditions, but no coins or cabinets were then handed
 over. In February, 1912, the testator made a codicil to his will
 and thereby, after reciting the gift of coins and cabinets in his will,
 he revoked the gift and declared that he had during his lifetime
 handed over to the university all the coins and cabinets he intended
 to leave them by his will. In August, 1912, the testator delivered
 to the university eleven cabinets containing the greater part of his
 coins, but some remained in his possession. On the death of the
 testator in 1915 the university claimed the remainder of the coins
 as part of his gift to them on the ground that the revocation by
 the codicil was based on an erroneous assumption of fact and was
 therefore conditional and inoperative so that the original gift in
 the will took effect :—

Held, that the revocation by the codicil was not conditional but

absolute, and that the university were only entitled to the coins and cabinets they had received in the testator's lifetime. NEVILLE J.

Held, also, that evidence of the statements made by the testator at the time the coins and cabinets were handed over was not admissible. 1916 CHURCHILL, *In re*.

Campbell v. French (1797) 3 Ves. 321 and *Doe v. Evans* (1839) 10 Ad. & E. 228 discussed. TAYLOR v. MANCHESTER UNIVERSITY.

ADJOURNED SUMMONS.

W. S. Churchill, who resided at Manchester, by his will dated September 16, 1901, made the following bequest:—"I give all my coins together with the cabinets in which they are placed to the Owens College of this city desiring the authorities thereof to hold them as a permanent collection along with any similar collection they may now or hereafter possess. I also give to the said college the sum of two hundred pounds to be expended in the provision of suitable receptacles for the said coins. It is my great wish that the said collection shall be used as much as possible as a means of promoting the study of history in the said college, and I therefore express the wish without creating an absolute trust that the said authorities will place the whole or a portion of the collection in their museum or in a part to which they can give the public free access to inspect the same so far as the authorities shall find it possible so to do but all details regarding such arrangements I leave to their unfettered discretion."

By the third codicil, dated February 22, 1912, to his will the testator, after making certain pecuniary bequests, proceeded: "Whereas by my said will it is stated that I have given all my coins together with the cabinets in which they are placed to the Owens College of this city Now I hereby revoke such bequest to the Owens College as hereinbefore mentioned and declare that I have during my lifetime handed over to the authorities of such college all the coins and cabinets which I intended to leave to such college by my said will"; and the testator revoked the legacy of 200*l.* to the college, and gave to Frank Churchill his collection of English and Roman coins upon trust to hand over the same to one of the museums in Durban or Pietermaritzburg to be kept intact and labelled the "W. S. Churchill Collection."

The testator died in November, 1915, and his will with four codicils was duly proved by the executors therein named.

NEVILLE J. The testator at the date of his will had a large collection of foreign
 1916 coins and a small collection of English and Roman coins, and during
 CHURCHILL, his life was an active member of the museum committee of the college.
In re. In 1904 the college was by statute incorporated as the Victoria
 TAYLOR University of Manchester, and s. 10 of the Act provided that "any
 v. will deed or other document whether made or executed before or
 MANCHESTER after the passing of this Act which contains any bequest gift or
 UNIVERSITY. trust in favour of the college shall on and after the passing of this
 — Act be read and have effect as if the university were therein named
 instead of the college."

In January, 1912, the testator intimated to the university his intention to give them his collection of coins, and on the 24th of that month he wrote to the vice-chancellor of the university as follows :—

"In presenting to the university my collection of coins, medals, cabinets, accessories and numismatic books I desire the collection to be labelled 'The W. S. Churchill Collection of Coins,' and that a portion of the collection should be always exposed for public view and changed from time to time. The gift is made upon the condition that the entire collection shall be kept intact and not sold or any part of it exchanged."

This letter was read at a meeting of the council of the university held on February 7, 1912, when it was resolved to accept the collection on the conditions named in the letter, and the resolution was recorded in the minutes of the council; and at a meeting of the museum committee held on February 13, 1912, which the testator attended, a copy of his letter was read, and it was stated that the council accepted the coins on the conditions contained in the letter. No coins were, however, handed over to the university at this time, it being arranged with the testator that the transfer of the collection should be delayed until the strong-room then being built at the museum was completed. In August, 1912, the strong-room being completed, the university authorities attended at the testator's house, and he then delivered to them eleven cabinets which contained 19,230 coins and medals, of which about 1980 were British and Roman and the rest were foreign. But all the testator's coins and medals were not handed over to the university on this occasion, and there remained in his possession a number of foreign coins and

medals and some English and Roman coins and medals which at his death were valued for probate at 880*l.* 12*s.* 6*d.*, and about one fourth of this sum represented the value of the English and Roman coins and medals. The university claimed all these coins and medals as part of the testator's gift to them, but were willing that the English and Roman coins should be dealt with as directed by the codicil, and after some correspondence the executors issued a summons to determine whether the University of Manchester as the successors of Owens College were entitled to receive any and which of the testator's coins and medals beyond those handed over to the university in the testator's lifetime.

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Evidence was tendered on behalf of the university as to statements made by the testator in August, 1912, when the eleven cabinets were handed over, but it was held to be inadmissible.

Beebee, for the plaintiffs.

Jenkins, K.C., and *Roby*, for the university. This case falls within the principle that the revocation of a gift made upon an erroneous assumption of fact, which turns out to be false, does not take effect, it being considered conditional and dependent on a contingency which fails: *Jarman on Wills*, 6th ed. p. 188; *Campbell v. French* (1); *Doe v. Evans* (2); *Barclay v. Maskelyne*. (3) By his will the testator made an absolute gift of the whole of his collection of coins and medals, and the gift by his letter was also of all his collection and was accepted by the university. It is admitted that the property in the coins and medals did not pass by the letter, but the inference from the codicil is that the testator intended to give and thought he had given all his coins and medals other than the English and Roman. He must have had the letter in his mind, and probably thought the matter was at an end and that he was free to deal with the English and Roman coins and medals. The general description in the will is cut down by the letter and codicil to all his coins and medals other than the English and Roman. None were handed over at that date, but he meant to give all the foreign ones. He was in bad health at that time, and after August could not be bothered with business matters. By mistake the

(1) 3 Ves. 321.

(2) 10 Ad. & E. 228.

(3) (1858) John. 124.

NEVILLE J. university have got some English and Roman coins and medals
 1916 they were not intended to have and did not get all foreign ones he
 CHURCHILL, intended to give them.

In re. *Whinney*, for F. Churchill and a residuary legatee. The revocation
 TAYLOR by the codicil was not made under a mistake of fact. The testator
 v. really did intend to revoke the gift in his will. Jarman on Wills,
 MANCHESTER UNIVERSITY. 6th ed. p. 189, points out the distinction between a revocation
 founded on a mistake of fact and a revocation founded only on a
 mistaken belief and not on a mistake of fact. The Court cannot go
 into the testator's motive, but looks at the codicil, and the revocation
 if absolute takes effect although founded on a mistake: Theobald
 on Wills, 6th ed. p. 711; *Attorney-General v. Lloyd* (1); *Attorney-
 General v. Ward* (2); *Thomas v. Howell* (3); *Dashwood v. Peyton* (4);
In re Bagot. (5) The revocation here was intentional. The testator
 meant to revoke the general gift in his will of all his coins and medals
 because he had given the university all he intended to give them in
 his lifetime. He believed he had made a complete gift by his letter;
 that was an error of law, but he subsequently perfected the gift in
 his lifetime. It is impossible to take the view that he intended to
 give any coins and medals in excess of those handed over in his
 lifetime. The declaration in the codicil is at the utmost a false
 statement following an absolute revocation which leaves the univer-
 sity to depend upon what was handed over to them in the lifetime
 of the testator.

NEVILLE J. This case is one of considerable difficulty—a difficulty
 not occasioned by anything to be found in the will, or in the codicil,
 but occasioned by the somewhat curious doctrine which appears to
 be established by the cases to which I have been referred, and
 notably by *Campbell v. French* (6) and *Doe v. Evans*. (7) In
Campbell v. French (6) it was held that where a man had given a
 legacy to legatees and then revoked that legacy, “they being all
 dead” when in fact they were not, that may be read as what
 has been called a conditional revocation, and not an absolute
 revocation. Now, a conditional revocation to my mind clearly

(1) (1747) 3 Atk. 551.

(4) (1811) 18 Ves. 27, 41.

(2) (1797) 3 Ves. 327.

(5) [1893] 3 Ch. 348.

(3) (1874) L. R. 18 Eq. 198.

(6) 3 Ves. 321.

(7) 10 Ad. & E. 228.

it is not; but it is only by calling it so that you can give effect to what was probably the intention of the testator, to be gathered from the words that he used, that the reason why he revoked the will was because he thought the legatees were dead. *Doe v. Evans* (1) is very much to the same effect as *Campbell v. French*. (2) It seems to me that those cases have gone a considerable way towards making a will for a testator in order to carry out what was extremely probably his intention, and I must say that in the present case, if I felt myself justified in doing so, I am strongly tempted to do the same thing, because here the testator had a valuable collection of coins and medals, the whole of which he had given to the University of Manchester by his will. He subsequently conceived the idea of making the gift during his life, and he wrote to the authorities of the university on January 24, 1912, telling them so, and imposing certain conditions upon their acceptance of the gift. Thereupon by resolution properly passed they acceded to the conditions he had laid down and accepted the gift, and if all that was required to make that a good gift on the offer of the testator was the acceptance on the part of the university, it seems to me that the whole of the collection of coins of all kinds would have become the property of the university. But then subsequently he made a codicil to his will in these terms: [His Lordship read the codicil and proceeded:] Now I take it that this codicil would operate as a revocation pro tanto of the gift in the will, but subject to this, that the effect of saying this revocation was a conditional revocation would be to revive the gift by the will and to pass the whole of his coins to the university. I cannot honestly say that I can read into this revocation any condition whatever. What I do find is that he apparently supposed that by writing the letter and obtaining the acceptance he had done all that was necessary to pass the property in the collection of coins to the university. In that he was wrong. In my opinion it was merely an imperfect gift, but I think that the testator from the words he has used really thought it was a gift of the coins to the university. In my opinion, therefore, looked at from that point of view, there was nothing conditional in the revocation, and I cannot say that the revocation fails.

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(1) 10 Ad. & E. 228.

(2) 3 Ves. 321.

NEVILLE J. Then it is said that he subsequently handed over to the university eleven cabinets filled with coins and medals and that these cabinets
 1916
 CHURCHILL, unfortunately did not contain the whole collection of foreign coins
In re. and medals which the testator had made, and which it is alleged,
 TAYLOR and I dare say truly, was what he intended to give to the university,
 v. and also that they contained a considerable number of British and
 MANCHESTER ROMAN coins which by the codicil he gave to the museum of Durban
 UNIVERSITY. or Pietermaritzburg. In the first place, it does not appear to me
 — that I can go into that question at all. If once I come to the conclusion, as I do, that the revocation was not conditional, obviously it does not help, for how can I look at what happened subsequently to the date of the execution of the codicil to ascertain what was meant by the words used in the codicil? The surrounding circumstances existing at the time the codicil was executed I am entitled to know and to look at, but what happened subsequently appears to me to be not relevant evidence for the present purpose. I regret having to come to this conclusion, and I hoped that possibly some arrangement might be made, because here is a collection which will be spoilt owing to the confusion in the testator's mind as to what had taken place; but I can quite understand the circumstances which preclude the possibility of coming to a satisfactory arrangement. Therefore all that I can do is to come to a conclusion on the will and codicil, and I hold that the effect of the codicil is to revoke the gift of the coins and medals contained in the will.

Solicitors: *Billing & Co., for Parker, Ayre & Co., Manchester; Bower, Cotton & Bower, for H. Harwood, Manchester.*

H. L. F.

In re DOLOSWELLA RUBBER AND TEA ESTATES,
LIMITED AND REDUCED.

NEVILLE J.

1916

Nov. 28.

[00356 of 1915.]

Company—Reorganization of Capital—Reduction of Capital—Sub-division of Shares partly paid up—Resulting Shares partly paid and wholly unpaid—Surrender of wholly unpaid Shares—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 41 (d), 45, 46 (a), 120.

The issued share capital of a company consisted of 640 shares of 500*l.* each on which 185*l.* per share had been called up and paid. The Court under s. 46 (a) of the Act sanctioned a special resolution reducing this capital by (a) dividing each issued share of 500*l.* into five shares of 100*l.* each ; (b) apportioning the 185*l.* called up on each issued 500*l.* share equally between three of the 100*l.* shares resulting from such sub-division, leaving a liability of 38*l.* 6*s.* 8*d.* on each of such three 100*l.* shares ; and (c) surrendering for re-issue when required the remaining wholly unpaid two shares of 100*l.* each resulting from such sub-division of each issued 500*l.* share.

PETITION.

The above-named company was incorporated on February 20, 1913, under the Companies (Consolidation) Act, 1908, with the object of acquiring, working, and developing a rubber estate in Ceylon of about 8000 acres. The capital of the company was 350,000*l.* divided into 700 shares of 500*l.* each, of which 640 shares were issued. All the issued shares were called up to the extent of 185*l.* per share, leaving an uncalled liability of 315*l.* per share. All the calls had been paid on 627 shares ; but on six shares only 165*l.* per share had been paid, and on seven shares only 130*l.* per share had been paid, leaving 20*l.* and 55*l.* per share respectively due on such last-mentioned shares.

The articles of association of the company provided (article 27) that the board might accept from any member, on such terms and conditions as should be agreed upon, a surrender of his shares or any part thereof ; and (article 58) that the company might from time to time by special resolution reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares or otherwise as might seem expedient, and that the company might also by special resolution sub-divide its shares or any of them.

NEVILLE J. Circumstances having made it undesirable that the original
 1916 programme of planting 8000 acres should be carried out, the com-
 DOLOSWELLA company decided to limit the area for cultivation for the time being to
 RUBBER 4000 acres, and found that for this purpose it would not require
 AND TEA the whole of its issued share capital. It therefore determined to
 ESTATES, reduce its issued share capital by 200*l.* a share, and with that view
 LIMITED (a) to divide each of the 640 issued shares of 500*l.* each into five
 AND shares of 100*l.* each, so that the 185*l.* paid up on each original
 REDUCED, issued share of 500*l.* should be credited equally between three of
 In re. the 100*l.* shares resulting from such sub-division, leaving a liability
 of 38*l.* 6*s.* 8*d.* on each of the three 100*l.* shares ; and (b) to surrender
 wholly unpaid each of the remaining two shares of 100*l.* each result-
 ing from such sub-division, so that such surrendered shares could
 be re-issued as unpaid should it be decided later on to extend the
 company's operations.

To carry into effect this scheme the company by a special resolu-
 tion duly passed and confirmed in accordance with s. 69 of the Act
 resolved as follows :—

“(a) That each of the existing 640 issued shares of 500*l.* each in
 the company's capital Nos. 1 to 640 inclusive be divided into five
 shares of 100*l.* each so that the amount of 185*l.* now paid up on
 each of the said issued shares shall be credited equally between
 three of the 100*l.* shares resulting from such sub-division, leaving
 a liability of 38*l.* 6*s.* 8*d.* on each of such shares.

“(b) That the remaining two of the shares of 100*l.* each resulting
 from such sub-division shall be wholly unpaid.

“(c) That the 1920 shares of 100*l.* each with 61*l.* 13*s.* 4*d.* credited
 as paid up thereon resulting from such sub-division be numbered
 1 to 1920 inclusive, and that the 1280 wholly unpaid shares
 resulting from such sub-division be numbered 1921 to 3200 inclusive.

“(d) That the said 1280 unpaid shares be surrendered to the
 company for future issue and upon such surrender the liability
 thereon of the present holders thereof be wholly extinguished.

“(e) That each of the existing 60 unissued shares in the company's
 capital of 500*l.* each Nos. 641 to 700 inclusive be divided into
 five shares of 100*l.* each, and that the 300 shares resulting from such
 sub-division be numbered 3201 to 3500.”

The company now petitioned the Court to sanction the reduction

of issued capital to be effected by the special resolution. The company had no debenture issue, and no creditors other than creditors for wages and other current expenses. There was evidence that the amount already paid up and liable to be paid up on the shares which would remain issued after the reduction and surrender of the shares referred to in the resolution would be amply sufficient for its present requirements. The 1280 shares referred to in the resolution had been surrendered to the company.

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Clayton, K.C., and *Sir D. Warmington*, for the company. The point on the petition is s. 41 (*d*) of the Act. The company could not do under that section what the Court is now asked to sanction, but it is submitted that it can be done under s. 46 (*a*). There is no direct authority, but in *In re Vine and General Rubber Trust, Ltd.* (1) the Court under s. 45 sanctioned a scheme, not unlike the present, by splitting each partly paid up share into two shares so that the entire liability for future calls was thrown on one only of the two new shares so resulting. In the report of that case s. 41 (*d*) is not mentioned, but it must have been brought to the attention of the Court. It is submitted that s. 41 (*d*) does not conflict with ss. 45 and 46 (*a*). Sect. 41 (*d*) limits what a company can do without coming to the Court, and ss. 45 and 46 (*a*) prescribe what a company can do with the sanction of the Court. We are really reducing capital because the liability on each of the 1280 resulting shares of 100*l.* which have been surrendered could have been called up or mortgaged by the company.

[NEVILLE J. referred to s. 120.]

Under that section the Court has to direct a meeting of the members of the company to be held, and it is not desired to proceed in that way. It is submitted that it is unnecessary in the present case because the resolutions were passed unanimously by more than the requisite majorities. At any rate we will take the risk and the responsibility. The stamp duty on the whole of the original issued share capital has been paid, and the company are anxious that the 1280 resulting shares of 100*l.* each that have been surrendered should not be deemed to be extinguished, but held for re-issue,

NEVILLE J. so as to avoid on re-issue the payment of stamp duty a second
 1916 time.

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NEVILLE J. It seems to me that what is proposed to be effected by the resolution can be done under s. 46 (a), and you may take the order.

The minute as registered was as follows :—

The capital of the company is henceforth 350,000*l.* divided into 3500 shares of 100*l.* each and at the time of registration of this minute 1920 of such shares Nos. 1 to 1920 inclusive have been issued and on 1881 of them, Nos. 1 to 1323, 1345 to 1347 and 1366 to 1920 inclusive, the sum of 61*l.* 13*s.* 4*d.* has been paid and is deemed to be paid up, and on 18 shares, Nos. 1348 to 1365 inclusive, 55*l.* per share has been paid and is deemed to be paid up, and on the remaining 21 shares, Nos. 1324 to 1344 inclusive, 43*l.* 6*s.* 8*d.* per share has been and is deemed to be paid up. The residue of the said shares, namely, 1580, are unissued and nothing is to be deemed paid up thereon.

Solicitors : *Stephenson, Harwood & Co.*

H. L. F.

NEVILLE J.

In re H. P. DAVIES & SON.

1916

[1916 D. 771.]

Nov. 23, 1920.

Solicitor—Bill of Costs—Solicitor-Trustee—Taxation by Co-trustee—
“ Party chargeable ”—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37—
Rules of the Supreme Court, 1883, Order LIV., r. 4 (F)—Practice.

Where a member of a firm of solicitors is a trustee, entitled under the instrument of trust to charge for his professional services, and his firm deliver a bill of costs to the trustees of the instrument for work done as solicitors to the trust, the co-trustee is a “ party chargeable ” within the meaning of s. 37 of the Solicitors Act, 1843, and can tax the bill under the Act on a summons taken out under Order LIV., r. 4 (F).

ADJOURNED SUMMONS.

G. H. Drew, who died in 1906, by his will appointed H. P. Davies, a solicitor, and two other persons his executors and trustees, and devised and bequeathed to them all his estate upon certain trusts, some of which were still subsisting. All the executors proved the will, which contained the following clause : “ And I declare that

any trustee in the conduct of the trust business may instead of NEVILLE J. acting personally employ and pay an agent whether being a solicitor or other person to transact all business and do all acts required to be done in the trust including the receipt and payment of money. And I declare that any trustee being a solicitor or other person engaged in any profession or business shall be entitled to be paid all usual professional charges for business transacted and acts done by him or any partner of his in connection with the trusts hereof including acts which a trustee not being in any profession can have done personally.”

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& SON,
Ex re.

H. P. Davies survived his co-trustees and, in exercise of his statutory powers, by deed dated March 29, 1915, appointed the Public Trustee to be a trustee of the will in the place of the two deceased trustees. The deed contained the usual vesting declaration, and a declaration that the same should not operate as an assent by the executors to the residuary bequest contained in the will, nor prevent them from calling in any outstanding personal estate or applying the same in payment of debts or otherwise in due course of administration, or from doing any act or thing in the character of executors which they might have done if the deed had not been executed, but the position of all parties after the execution of the deed should be the same in all respects as if the Public Trustee had been named in the will as a trustee (but not as an executor) and the deed had not been executed.

After the execution of this deed the banking account of the estate was transferred into the joint names of H. P. Davies and the Public Trustee.

The firm of H. P. Davies & Son, in which H. P. Davies was a partner, had acted as solicitors to the trustees from the death of the testator and continued so to act after the appointment of the Public Trustee, and on April 28, 1916, H. P. Davies forwarded to the Public Trustee his firm's bill of costs, headed “The Trustees of George Henry Drew, deceased,” with the following covering letter :—

“Drew Will Trust.

“I enclose my firm's account to the 31st December last, for which I shall be glad to draw after you have looked it through. Some of the items will have to be charged against income before dividing

NEVILLE J. the surplus under the terms of the will. I have not thought it
 1916 worth while to keep these charges against executor and trustee
 H. P. DAVIES separate as I am alone responsible for any sums taken by me for
 & SON, costs from the estate.”
In re.

On June 3 the Public Trustee caused the following answer to be sent :—

“ In view of the large amount of the bill and the fact that the Public Trustee is not satisfied that all of the items are chargeable against the trustees, the Public Trustee thinks that it would be more satisfactory for all the parties concerned that the bill should be taxed. If you agree to the taxation he thinks the better course would be to have the bill taxed under what is known as the Chitty Order ; otherwise, he believes that the right procedure will be for him to take out a summons.”

To this H. P. Davies replied under date of June 5 as follows :—

“ As I am solely responsible for any sums retained out of the estate for my costs, and no taxation at the present time can be binding on the beneficiaries, I have no hesitation in saying that the estate should not be put to the cost of such taxation and I cannot agree to it. I am quite ready to meet you and discuss the matter with you, but it would be convenient that you should first let me know what items in my bill you think are not chargeable against the estate. May I ask that this will have your early attention as it is hardly fair to me to let the matter drag on, as it did last year, and the bill has been before you since April 28th last.”

After some further correspondence the Public Trustee issued an originating summons under Order LIV., r. 4 (F), for an order that it might be referred to the taxing Master to tax and settle the bill of fees, charges, and disbursements, amounting to the sum of 114*l.* 14*s.*, delivered by H. P. Davies & Son to the trustees of G. H. Drew, deceased.

H. P. Davies in his affidavit in opposition to the summons alleged, amongst other things, that the Public Trustee was not the “ party chargeable ” within the meaning of s. 37 of the Solicitors Act, 1843 ; that the taxation would not be final within the meaning of the same section, nor would it be binding on the beneficiaries ; and that the bill contained items for work done prior to the date of the applicant’s appointment as trustee.

Whitmore Richards, for the summons. The bill delivered covers the period January to December, 1915, and the Public Trustee thinks many of the items charged in July and onwards are excessive. He does not see his way to moderate or agree the amount of the bill and considers the only way is to tax. Where it is not a case for the common order of course, the proper procedure is by summons: *In re Fenton*. (1) The present application is by summons under Order LIV., r. 4 (F), and the Public Trustee submits that for this purpose he represents the beneficiaries. If the Public Trustee had refused to pay, the firm could have sued him and the order would have gone for taxation and for payment of the amount certified to be due. *Hazard v. Lane* (2) decides that one of two trustees can tax a solicitor's bill of costs for work done for the trust, if the co-trustee does not join or objects, and in *Lockhart v. Hardy* (3) an order of course to tax a bill of costs incurred by two persons was made upon the application and submission to pay of one only. These are decisions under the statute 2 Geo. 2, c. 23, s. 23, the provisions of which were very similar to s. 37 of the Solicitors Act, 1843, but required that the application should contain a submission to pay what should be found due. Under the Act of 1843 a submission to pay is unnecessary, because the Court can always impose conditions if it thinks fit: *In re Brockman*. (4) In the case of *In re Lewin* (5) an order of course by one of two trustees was held irregular on the ground that there should have been a special petition, but in *Waugh v. Waddell* (6) a married woman who employed a solicitor making her separate estate liable was held, though not personally liable, to be a "party chargeable" within s. 37 of the Act of 1843. It is submitted that under the circumstances the Public Trustee is a "party chargeable" within the meaning of that section, and that the proper procedure has been adopted. He is willing to submit to pay the certified amount subject to his right to indemnity out of the trust estate. It is the duty of a solicitor to tell his client, when a trustee, that, if he does not tax the bill of costs, the items not properly chargeable will be disallowed in passing his accounts: *Ex parte*

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& SON,
In re.

(1) [1894] W. N. 128.

(2) (1817) 3 Mer. 285, 290.

(3) (1841) 4 Beav. 224.

(4) [1909] 2 Ch. 170, 173.

(5) (1853) 16 Beav. 608.

(6) (1853) 16 Beav. 521.

NEVILLE J. *Flower* (1); and it is also the duty of a solicitor-trustee to tell
 1916 his beneficiaries that they are entitled to tax his bill of costs :
 H. P. DAVIES *In re Webb* (2); and a solicitor-trustee cannot settle the amount
 & SON, of his bill with his co-trustee so as to bind his beneficiaries :
In re, *Fish*. (3). Here the Public Trustee feels that unless the bill
 is taxed he will not be safe.

Jenkins, K.C., and *R. W. Turner*, for the respondents. Taxation under the general jurisdiction of the Court is not opposed; what is objected to is the procedure. It is submitted that the present procedure is wholly irregular and that no order should be made on the summons. The sole question is whether s. 37 applies and whether the applicant has selected the right course. The contention is that s. 37 only applies between solicitor and client, that is, to a person who has retained a solicitor, and he only gets his order because he is the "party chargeable" and is the person liable to pay the certified amount to the solicitor. *Waugh v. Waddell* (4) is the only case in which an order has been made under the section against a person not personally liable to pay. Nowadays a married woman can be sued as a feme sole. The Public Trustee gave Davies no retainer and is not his client and cannot be sued by him. He could not sue anybody for this bill. Sect. 43 of the Act points out that the taxation must be final and conclusive, but this taxation will not be final because it will not be binding on the beneficiaries: *In re Wellborne*. (5) Further, this bill should not be treated as a solicitor's bill of costs delivered to trustees as the persons liable to pay. Regard should be had to the circumstances in which it was sent: *In re Hulbert and Crowe*. (6) It is not headed "to the present trustees," and the correspondence shows that it was not sent as a bill delivered for taxation, but as a claim against the estate for his costs, charges, and expenses for perusal, and with the view that the amount might be agreed or modified so that he could draw against the banking account of the estate for the agreed sum. If the Public Trustee was dissatisfied he should have taken out a summons, or asked the respondents to take out a summons, under Order LV., rr. 3 (e) and 8, making one of the residuary legatees

(1) (1868) 18 L. T. 457.

(2) [1894] 1 Ch. 73.

(3) [1893] 2 Ch. 413, 420.

(4) 16 Beav. 521.

(5) [1901] 1 Ch. 312, 314.

(6) (1894) 71 L. T. 748.

a party, so that the taxation, which would have been under the general jurisdiction of the Court, would have been binding on the beneficiaries. We ask that no order should be made on the present summons, but that a summons should be taken out under Order LV., r. 3 (e). Lastly, if there is to be a reference to tax, the order should go with reservations and modifications. The executorship is not closed owing to the testator's estate being still liable for some years to come under his covenants with respect to roads on his Caterham estate. All the items in the bill prior to April, 1915, are executorship charges and should not be included in the taxation; and the applicant should undertake to be personally liable to pay the amount found due on taxation.

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—

NEVILLE J. This summons raises a question of general importance. The testator by his will appointed Mr. Davies and two other persons to be his executors and trustees. Subsequently by an indenture dated March 29, 1915, Mr. Davies appointed the Public Trustee to act with him in the place of the two deceased trustees, and provided that he was not, as indeed was inevitable, to share the office of executor, but only to share the office of trustee. The estate is wound up, except with respect to a possible liability under certain covenants which may extend over a long period, and the executor has handed over to the trustees the whole of the estate subject to a reservation of his rights, whatever they may be, in respect of any legal claim as executor. Mr. Davies is a member of the firm of H. P. Davies & Son. On April 28, 1916, he sent a document to the Public Trustee, upon the outside of which he put "Charges," and inside it is headed "The Trustees of George Henry Drew, deceased, to H. P. Davies & Son." There is no magic in the words "bill of costs," and I think anybody seeing that document would say that it was the delivery of a bill of costs due from the trustees of George Henry Drew, deceased, to H. P. Davies & Son, and that the trustees there must mean the trustees for the time being. That was accompanied by a letter in which Mr. Davies says "I enclose my firm's account to the 31st of December last, for which I shall be glad to draw after you have looked it through"—that means "Unless you raise objections I shall draw upon the estate account for the amount of the bill." Then he goes

NEVILLE J. on : "Some of the items will have to be charged against income before dividing the surplus under the terms of the will. I have not thought it worth while to keep these charges against executor and trustee separate as I am alone responsible for any sums taken by me for costs from the estate." That, I think, is a misapprehension of the legal position of the Public Trustee. The Public Trustee answers through his agent and proposes taxation of the bill. Then comes Mr. Davies' letter of June 5, 1916. [His Lordship read it and continued :] The first question that is raised is, as I have said, a question of very general importance. Where a firm of solicitors, acting for the trustees of an instrument of trust, one of such trustees being a partner in the firm, deliver a bill of costs against the trustees, has the other trustee under the Act of 1843, s. 37, a right to obtain a taxation of those costs ? If he could not, it is obviously from the *cestui que trusts'* point of view a very serious matter, because *cestuis que trust* do not, and cannot, in the ordinary way do other than trust to their trustees ; and if charges are being heaped up against the estate by the solicitor-trustee which cannot be checked by taxation by the other trustee it would be a most unfortunate position. In modern instruments of trust clauses by which a trustee is entitled to charge for professional services to the trust are very common, and I believe that such a clause is usually inserted unless there are instructions to the contrary. At any rate, such clauses are now the rule. I myself see no objection to it, but I should if it threw any obstacle in the way of obtaining taxation of a trustee-solicitor's bill of costs. I think the authorities show clearly that one of two people jointly liable is entitled to taxation, and I think that is so none the less because the other person jointly responsible is a member of a firm of solicitors, and is the solicitor who has done the work for the trustees.

It is difficult to say what was the intention of these parties, but I do not think I can go behind the fact that on the face of the bill these charges are said to be charges against the trustees ; and therefore I think the Public Trustee has a right to tax them under the Act. He appears at one time to have thought he could exercise that right without incurring any personal responsibility. There I think he was wrong. It is clear that a party taxing under the Act is responsible for the costs of the taxation if he fails to reduce

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the bill by more than a sixth, and in my opinion the same responsibility is upon the Public Trustee, but without prejudice to his right of indemnity against the trust estate.

Then comes another question. Mr. Davies joined all his charges, as he calls them, against the estate together. He said he had not got out the charges against the executors and the trustees separately, and some of the charges would come out of income. I do not think that matters; but with regard to the other it may matter. I think really it was his own fault for adopting the method that he did, because he alleged the trustees were responsible, and when the discussion arose on the correspondence he never for a moment said "I have delivered my bill. It was only a suggestion that you should agree with me as to what I should draw from the estate." I think he was bound to do that at once, if there is any substance in the argument that he really did not intend it to be a bill at all. He obviously, I think, misunderstood his position, and probably was misled in what he did in consequence of that misunderstanding. I have the right to enforce conditions on the Public Trustee, and it seems to me only fair that the items in the bill prior to the date of his appointment as trustee of the will should be struck out. I have looked at the bill, and April 7, 1915, is the date of the first item in the charges in the bill which is subsequent to his appointment. For the rest the order must go in the usual form, and the respondents must pay the costs of the summons.

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1916
H. P. DAVIES
& SON,
In re.

Solicitors: *Theodore Goddard & Co.*; *H. P. Davies & Son.*

H. L. F.

NEVILLE J.

1916

Nov. 24, 29.

In re MONCKTON'S SETTLEMENT.MONCKTON *v.* CALDER.

[1916 M. 1293.]

Settled Lands—Powers—Remainderman in Fee in Possession—Portions Terms—Jointress—“Settlement”—“Tenant for Life”—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1, 5.

In 1894 lands were by deed settled to the use of A. for life, remainder to the use of B. (the eldest son of A.) in fee simple if he should survive A., with powers for A. to create portions terms for his younger children and for B. to jointure any wife and to create portions terms for his younger children. In 1896 B. married, and in exercise of his power by deed charged a jointure for his wife and created a portions term for his younger children. In 1916 A. died, having in exercise of his power created portions terms for his younger children, and B. became tenant in fee simple in possession subject to the several portions terms and the jointure:—

Held, that, in the events which had happened, the lands stood limited to or in trust for persons by way of succession under the deed of 1894, which constituted a “settlement” within the definitions in s. 2, sub-s. 1, of the Settled Land Act, 1882.

In re Mundy and Roper’s Contract [1899] 1 Ch. 275 followed.

Held, also, that B. was tenant for life of the settlement within the meaning of s. 2, sub-s. 5, of the Act, and could exercise all the powers of a tenant for life under the Act.

In re Marshall’s Settlement [1905] 2 Ch. 325 followed.

ADJOURNED SUMMONS.

This was an application to determine whether the plaintiff was a tenant for life, or a person having the powers of a tenant for life, under the Settled Land Acts, 1882 to 1890, in respect of certain lands, in these circumstances.

By an indenture of settlement dated November 21, 1894, and made between E. P. Monckton (the father of the plaintiff) of the first part, the plaintiff (who was the eldest son of E. P. Monckton) of the second part, and trustees of the third part, E. P. Monckton and the plaintiff, in exercise of a joint power of appointment conferred on them by a disentailing assurance dated November 20, 1894, appointed (inter alia) freehold lands in the counties of Rutland and Northampton (subject to two jointures since determined) to such uses as E. P. Monckton and the plaintiff should by deed jointly

appoint, and in default of such appointment (which happened) NEVILLE J. to uses securing the payment of a rent-charge to the plaintiff during the lifetime of E. P. Monckton, and subject thereto to the use of E. P. Monckton and his assigns for life, with remainder to the use of the plaintiff in fee simple if he should be living at the death of his father, but if he should be then dead, then, subject to the power of jointuring and charging portions thereafter given to him, to certain uses therein mentioned ; clause 3 of the settlement empowered E. P. Monckton at any time by deed or will to charge the settled lands with the payment for the benefit of his younger children of any sums not exceeding 17,000*l.* in the whole, with interest thereon at the rate of 3*l.* 10*s.* per cent. per annum, and to limit any terms of years commencing at his death upon usual trusts for raising the same ; clause 5 empowered the plaintiff, before he should become entitled to the possession or receipt of the rents and profits of the settled lands, but without prejudice to the uses, estates, and powers preceding or overriding the estate in fee simple thereby limited to him, at any time either before or after his marriage by deed or will to appoint to his wife for her widowhood, expectant on his decease and in the event of her surviving him, a jointure rent-charge of 400*l.* per annum to be charged upon the settled lands ; clause 6 empowered the plaintiff, before he should become entitled to the possession or receipt of the rents and profits of the settled lands, but subject and without prejudice to the uses, estates, or powers preceding or overriding the estate in fee simple thereby limited to him, at any time either before or after his marriage by deed or will to charge, as from the death of the survivor of the said E. P. Monckton and himself, the settled lands with the payment for the portions of his younger children of any sums not exceeding 4500*l.* in the whole, with interest thereon at the rate of 3*l.* 10*s.* per cent. per annum, and to limit any terms of years commencing at the decease of the survivor of the said E. P. Monckton and himself upon usual trusts for raising the same ; and clause 12 appointed trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

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 MONCKTON
 v.
 CALDER.

E. P. Monckton had married in 1856 and had ten children, all of whom attained the age of twenty-one years.

The power of charging portions for his younger children was

NEVILLE J. exercised by E. P. Monckton as follows :—(a) By a deed poll dated 1916 September 16, 1895, whereby he charged the settled lands with the payment of 2000*l.* for a younger son, with interest thereon at the rate of 3*l.* 10*s.* per cent. per annum, and limited the settled lands to trustees for a term of 500 years for raising the same ; (b) by his will dated December 10, 1895, whereby he charged the settled lands with 17,000*l.* for portions for his younger children and appointed the settled lands to the trustees of the deed of September 16, 1895, for a term of 500 years to raise the same, and directed that the 2000*l.* appointed by that deed should be brought into hotchpot ; (c) by a deed poll dated January 31, 1905, whereby he charged the settled lands with 650*l.* in favour of his daughter Lilian on her marriage and appointed the settled lands to trustees for a term of 1000 years, to commence from his death, to raise the same, with interest ; and (d) by a deed dated July 15, 1908, whereby he charged the settled lands with 2000*l.* in favour of his daughter Frances on her marriage and appointed the settled lands to trustees for a term of 1100 years, to commence at his death, to raise the same, with interest.

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SETTLEMENT,
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CALDER.

The plaintiff, George E. Monckton, married in 1896, and had issue three children, all of whom were minors.

The plaintiff exercised the powers of jointuring and charging portions given him by the deed of 1894 as follows :—By his marriage settlement dated March 26, 1896, whereby he charged the settled lands with a jointure rent-charge of 400*l.* per annum, to commence at the death of the survivor of himself and his father, with usual powers of distress and entry for securing the same ; and by the same deed he appointed the settled lands to trustees for a term of 800 years upon usual trusts for raising 4500*l.* for portions for his younger children, with interest.

In September, 1907, the plaintiff mortgaged his estate and interest in the settled lands in reversion expectant on the death of his father to secure 15,000*l.* and interest.

E. P. Monckton died in April, 1916.

The plaintiff, being desirous of selling portions of the settled lands as a tenant for life under the Settled Land Acts so as to avoid the difficulty and expense of obtaining the concurrence in conveyances to purchasers of the persons entitled to or interested in the

portions charge of 17,000*l.* and of his wife in respect of her jointure of 400*l.* and his younger children in respect of the said portions charge, issued a summons to obtain a declaration that, upon the true construction of the deed of November 21, 1894, and in the events that had happened, he was the tenant for life of the settled estates within s. 2, sub-s. 5, of the Settled Land Act, 1882; or, alternatively, that under s. 58, sub-s. 1 (ii.), of the Act he had the powers of a tenant for life over the settled estates.

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J. Bradley Dyne, for the plaintiff. The exercise by the plaintiff and his father of the powers of appointment given them by the settlement of 1894 has incorporated with that deed the portions terms and jointure rent-charge created by them respectively, and the settled lands now stand limited under that deed to or in trust for persons by way of succession and constitute a "settlement" within the meaning of that word as defined in s. 2, sub-s. 1, of the Settled Land Act, 1882: *In re Mundy and Roper's Contract* (1); *In re Phillimore's Estate* (2); *In re Lord Wimborne and Browne's Contract*. (3) In the next place, the plaintiff is a tenant for life of the settlement under the deed of 1894. He has in fact by the creation of the jointure and portions term which come into operation on his death cut down his fee simple to a life estate, and is a person who is for the time being under the settlement beneficially entitled to the possession of the settled lands for his life: *In re Marshall's Settlement* (4); alternatively, he is a person who has the powers of a tenant for life under the Act within the meaning of s. 58, sub-s. 1 (ii.).

Maw, for the present trustees of the portions term of 500 years. The plaintiff is a tenant for life under his own marriage settlement and can override the jointure or portions term he has created, but he is not, and never has been, a tenant for life under the settlement of 1894 and cannot override the portions terms created by his father. In the events which happened the plaintiff did not want his power, because he survived his father and it merged in the fee simple in possession that he then took. In all the cases cited the plaintiff was or had been tenant for life. The present case is

(1) [1899] 1 Ch. 275.

(2) [1904] 2 Ch. 460.

(3) [1904] 1 Ch. 537.

(4) [1905] 2 Ch. 325.

NEVILLE J. directly within the doubt expressed by Vaughan Williams L.J. in 1916 *In re Mundy and Roper's Contract* (1), and it is submitted that the portions terms created by E. P. Monckton came into operation contemporaneously with the plaintiff's fee simple and are not limitations by way of succession.

MONCKTON'S SETTLEMENT, *In re.*
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Beebee, for the present trustees of the terms of 1000 and 1100 years and also for the present trustees for the purposes of the Settled Land Acts under the deed of 1894, adopted the same line of argument, and referred to Wolstenholme's Conveyancing and Settled Land Acts, 10th ed. p. 466.

F. K. Archer, for the plaintiff's wife and the present trustees of the term of 800 years under their marriage settlement, did not oppose.

J. Bradley Dyne in reply.

Cur. adv. vult.

Nov. 29. NEVILLE J. By virtue of an indenture of settlement dated November 21, 1894, and by the exercise of powers of appointment therein by the plaintiff and his father, Edward Philip Monckton, now dead, certain lands stood limited upon the death of the latter in favour of certain portioners to the extent of 17,000*l.* with terms for securing the portions, and upon the death of the plaintiff to a jointure of 400*l.* a year and portions to the extent of 4500*l.* with terms of years to secure them, with a further limitation to the plaintiff in fee. The Court is asked by the summons to declare that upon the true construction of the settlement and in the events which have happened the plaintiff is the tenant for life of the estate within s. 2, sub-s. 5, of the Settled Land Act, 1882.

Having regard to the decision of the Court of Appeal in *In re Mundy and Roper's Contract* (2), it is, I think, plain that, having regard to the limitations created by the plaintiff in favour of the jointress and portioners, the estates are limited to or in trust for persons by way of succession and therefore are for the purposes of the Act settled. The words of Chitty L.J., delivering the judgment of himself and Lindley M.R. in that case, are, I think, precise and, subject to what I am about to say, conclusive: "The jointress and the portioners take an interest in the land, and they succeed to

(1) [1899] 1 Ch. 275, 297-8.

(2) [1899] 1 Ch. 275, 290.

their interests in the land on or after the death of the tenant for life." It was argued that here there was no tenant for life, the limitation in the settlement being to the plaintiff in fee. If the limitations had been on the death of the father to the son for life and then to any jointress and portioners appointed under the power given to the plaintiff by the settlement with remainder to the plaintiff in fee, the case would have been precisely within the decision in *In re Marshall's Settlement*. (1) But it is said, and said truly, in that case the settlor was given a life tenancy in terms, and that the decision turns upon that. It seems to me that there are two answers to that argument—first, that the powers given by the Act do not depend upon the intention of the settlor, so that whether he calls a limitation a limitation for life or whether upon death a fresh limitation is introduced can be of no importance; and, secondly, that s. 2, sub-s. 5, is explicit upon the point, for it defines a tenant for life not as one so called, but as the person who is for the time being under a settlement entitled to the possession of settled land for his life. It is clear here, I think, upon the authorities that, although he is entitled under the words of the settlement to the settled land in fee, other estates are or may be let in at his death, thereby reducing his immediate estate to an estate for life. It seems to me very undesirable to impair the benefits intended by the Act by drawing nice distinctions, and I must make a declaration in the terms of the first paragraph of the summons.

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Solicitors: *Beaumont & Son; Pickering & Crawley.*

(1) [1905] 2 Ch. 325.

H. L. F.

NEVILLE J.

In re OAKES.

1916

OAKES *v.* PORCHERON.Nov. 24 ; *
Dec. 1.

[1916 O. 885.]

*Administration—Supposed Intestate—Cancelled Will—Receiver pending
Probate—Probate Action—Proceedings—Practice.*

Among the papers of a person supposed to have died intestate was found a will purporting to be cancelled, and one of the next of kin issued a writ in the Chancery Division against the executor named in the will asking for the appointment of a receiver of the deceased's estate until a legal personal representative had been constituted, and moved for a receiver. Pending the hearing of the motion the defendant commenced an action in the Probate Court for probate in solemn form, and, on the hearing of the motion, opposed the appointment of a receiver on the ground that it was wholly unnecessary, it being the usual practice in the Probate Court to appoint a receiver or administrator pendente lite. The facts were not in dispute and the estate was not in jeopardy :—

Held, that no ground was shown for ousting the jurisdiction of the Court, and a receiver was appointed.

MOTION.

On November 8, 1916, W. H. Oakes died possessed of considerable personal estate consisting mostly of stocks and shares in companies. He also had a leasehold flat. He was a widower and left no issue, and was believed to have died intestate. His sole next of kin were his brother, the plaintiff, and a married sister, Mrs. Herapath, a defendant, and they proceeded to act, and did act up to November 15, in respect of the deceased's estate as if they were entitled to a joint grant of administration to his estate and were beneficially entitled to his personal estate. In the meantime Messrs. Broad & Son, the solicitors of the defendant Porcheron, informed the plaintiff's solicitors that they had prepared a will for the deceased in May, 1911, under which the defendant Porcheron was executor, that in December, 1913, the deceased had written them for his will as he wished to destroy it and make another will, and that they had sent him the will, but did not know whether it had been destroyed or not.

On November 15, 1916, the plaintiff found amongst the papers of the deceased a will dated May 31, 1911, with the deceased's signa-

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ture run through in pen and ink and the words and figures "Cancelled 29.12.13. W. H. O." in the deceased's handwriting. Under this will the defendant Porcheron and his children and the plaintiff's children were beneficiaries and the defendant Porcheron was the executor. It was considered doubtful whether the will had been duly revoked, and the defendant Porcheron claimed the will with the view of obtaining probate, and also demanded the key of the flat. The plaintiff did not comply with his request, and on November 21 issued the writ in this action against the defendants, claiming (1.) the appointment of a receiver of the estate of the deceased until a legal personal representative had been constituted, and (2.), when a legal personal representative had been constituted, administration of the estate by the Court. At the same time the plaintiff obtained leave to serve short notice of motion for a receiver for Friday, November 24. On that day the motion on the defendant Porcheron's request stood over for a week to answer the plaintiff's affidavits, there being no urgency, and the will was deposited in Court.

In the meantime, on November 28 the defendant Porcheron commenced proceedings in the Probate Division to prove the will in solemn form, as Mrs. Herapath disputed it.

On December 1 the plaintiff's motion came on again, and the defendant Porcheron in his affidavit deposed that he was prepared to do his duty as executor, that in the probate proceedings all necessary steps could be taken (including the appointment of a receiver *pendente lite*) for the purpose of protecting the estate, and that there was no necessity at all for the appointment of a receiver by the Chancery Division and no urgency in the matter, and that such an appointment would be an unnecessary expense to the estate.

Jenkins, K.C., and *Stokes*, for the motion, asked for the appointment of a receiver until a legal personal representative of the deceased had been constituted.

Ward Coldridge, K.C., and *F. E. Farrer*, for Mrs. Herapath, supported the application.

Butcher, K.C., and *W. O. Willis*, for the defendant Porcheron. Proceedings having been commenced in the Probate Court for

NEVILLE J. probate in solemn form, the proper course is to apply in those proceedings for a receiver or an administrator pendente lite. That Court has ample jurisdiction to make the appointment, and it will be in accordance with the usual practice: Annual Practice, 1917, p. 891; *In re Green* (1); *Bellew v. Bellew* (2); Tristram and Coote's Probate Practice, 15th ed. pp. 158-9, 335. There can be no administration until a legal personal representative has been constituted, and the defendant is prepared to apply at once in the probate proceedings for an administrator pendente lite. It is submitted that the usual practice should be followed and that the present application is an unnecessary expense, there being no urgency and the estate not being in jeopardy: *Horrell v. Witts*. (3)

Jenkins, K.C., was not called upon.

NEVILLE J. Formerly there used to be a practice very popular with solicitors—and I will not say that it was altogether unpopular with the Bar—of racing for an administration decree. In those days the Courts granted a decree for administration on the application of anybody who could show that he was interested in the estate, and consequently attempts were made in the various Courts of Chancery to get a decree in the first instance. That was put a stop to after a little time by the invariable rule of the Courts that the conduct of the proceedings should be given to the party who commenced proceedings first, and not to the persons who got a decree first. Thereby the machinations of the parties in that race were defeated and it ceased to be worth their while to compete. Now all these questions are simply questions of costs. It matters little or nothing whether a receiver is appointed by this Court or whether a receiver or an administrator pendente lite is appointed by the Probate Court. I should think in a case like the present it is better, where it is possible, to apply in the Probate Court and not to apply to this Court. All the Courts now are practically worked together, and it is of no practical importance whether the person in charge of the estate is called a receiver or an administrator pendente lite.

In the present case a gentleman died leaving a large estate. He was at first supposed to have died intestate, and his next of kin

(1) [1895] W. N. 69.

(2) (1865) 4 Sw. & Tr. 58.

(3) (1866) L. R. 1 P. & M. 103.

proceeded to take possession of such parts of the estate that required immediate attention. Then it was discovered that there was a will which had once been executed, but upon it indications were shown, which may or may not prove sufficient to revoke the will, that the testator no longer desired it should operate as his will. The next of kin, I think very properly in the first instance, issued a writ for the purpose of obtaining a receiver until it could be known whose was the right to receive the assets. A motion in that action commenced by that writ was made for a receiver. The motion came on, but there did not appear to be any immediate necessity for appointing a receiver. The defendant Porcheron, who was a respondent to the motion, obtained the sanction of the Court to the motion standing over for a week on the ground that he was not sufficiently *au fait* with the evidence. It now appears that the facts were really not in dispute, and the interval between the date when the motion was brought on in the first instance and the adjourned hearing was utilized by the respondent in starting fresh proceedings in the Probate Court with the view of getting a receiver or an administrator pendente lite appointed by that Court instead of a receiver in Chancery. As I said before, it matters little which is done, but it matters much that costs should not be unnecessarily occasioned by scrambles of this kind as to who is to have the interim management of the estate until it is known who is the person entitled to representation. Therefore it appears to me to be my duty to appoint a receiver in order to discourage any attempt of this kind to go behind proceedings in one branch of the Court by commencing proceedings in another branch so as to oust the person who originally applied for the protection of the Court. The order will go in the usual form for appointing a receiver until after a legal personal representative is constituted, and the will can be handed out to the defendant Porcheron on his undertaking to lodge it in the Probate Court.

NEVILLE J.
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OAKES,
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PORCHERON.

Solicitors for plaintiff : *Stanley Attenborough & Co.*

Solicitors for defendants : *Broad & Son ; P. Jerome.*

H. L. F.

Distinguished, CANNON
v. HARTLEY.
 [1949] 1 Ch. 213

EVE J.

1916

Dec. 13, 19.

In re PRYCE.NEVILL *v.* PRYCE.

[1916 P. 1373.]

*Marriage Settlement—Covenant to settle Wife's after-acquired Property—
 Husband's and Wife's Funds—Gift by Husband to Wife—Volunteers
 —Next of Kin—Trustees not bound to enforce Covenant.*

A marriage settlement made in 1887 contained a covenant to settle the wife's after-acquired property upon the trusts of the wife's funds, which were in the usual form, and an agreement by the husband to settle any sums to which he became entitled under the will of his father. By a deed of gift in 1904 certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in two sums of 9000*l.* and 4700*l.* appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement come to in 1889. The share of the 9000*l.* fell into possession in 1891 on the death of his father, and was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the 4700*l.* came into possession in 1916 on the death of the husband's mother, and were now outstanding in the trustees of his parents' settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will.

Upon a summons by the trustees of the marriage settlement to have it determined whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should take proceedings to enforce them :—

Held, (1.), that they were caught by the covenant of the wife and the agreement by the husband respectively ; but

Held, (2.), that the trustees ought not to take steps to recover any of them. In the case of the wife's fund her next of kin were volunteers, who could neither maintain an action to enforce the covenant, nor for damages for breach of it, and the Court would not give them by indirect means what they could not obtain by direct procedure.

In re D'Angibau (1880) 15 Ch. D. 228 followed.

ADJOURNED SUMMONS.

The plaintiffs, the Hon. George Montacute Nevill and the Hon.

Louis Johnstone, were the present trustees of an indenture of settlement dated August 30, 1887, made on the marriage of the defendant, Mabel Georgina Pryce, to Pryce Meyrick Pryce. By this marriage settlement certain property and funds belonging to the defendant (the wife's trust funds) were settled upon trust for the defendant, during the joint lives of herself and her husband for her separate use, without power of anticipation, with remainder to the survivor of them, with remainder for the children of the marriage, with remainder as to a sum of 6000*l.*, part of the wife's trust funds, for (in the events which happened) the defendant absolutely; and as to the residue of the wife's trust funds, including any after-acquired property, and subject to the trust of the wife's trust funds, to the persons who would be entitled thereto under the statutes of distribution of intestates' estates had she died intestate and without having been married. By clause 3 of this settlement it was agreed that all real and personal property not thereinbefore settled to which the defendant at the time of the said intended marriage, or she, or her husband in her right, at any time during her then intended coverture, should be or become entitled, whether in possession, reversion, or otherwise, should, as soon as circumstances would admit, be assured and transferred by the husband and wife respectively, or by other necessary parties, to or otherwise vested in the trustees, upon the trusts and subject to the powers and provisions thereinbefore declared concerning the wife's trust funds. By clause 5 of the settlement it was agreed and declared that the trustees should stand possessed of any sum to which the husband should become entitled under the will of his father, Robert Davies Pryce (who was a party to the marriage settlement), upon trust for the husband during the joint lives of the spouses, and then to the survivor, with remainder to the children or issue of the marriage, and in default of any upon trust for him absolutely.

Under and by virtue of two indentures respectively dated January 17, 1849, made on the marriage of Robert Davies Pryce and Jane Sophia Pryce (the father and mother of Pryce Meyrick Pryce), property and funds were settled on trustees upon trust, after the deaths of R. D. Pryce and his wife, for the issue of the marriage as they should by deed jointly appoint, with trusts over in default of appointment. By a deed poll of appointment dated April 23, 1868,

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R. D. Pryce and his wife, in exercise of this joint power of appointment, duly appointed all the property and funds subject to the trusts of the 1849 settlement in favour of and upon trust for all and every the children of their marriage in equal shares contingently on attaining twenty-one, or, being daughters, marrying.

There were four children of the marriage of R. D. Pryce and his wife, of whom Pryce Meyrick Pryce was one, and he thus became absolutely entitled to a vested interest in one fourth of the property subject to the 1849 settlement, which amounted to about 4500*l.*

By a deed of gift dated December 12, 1904, Pryce Meyrick Pryce absolutely conveyed to his wife all his share and interest in the capital surplus moneys arising from the sale of the land referred to in the 1849 settlement, and all other capital money, stocks, securities, and personal estate comprised in the said settlement and subject to the joint power of appointment, to hold the same to his wife for her separate use absolutely, subject to the life interest therein of his mother, Jane S. Pryce.

Pryce Meyrick Pryce died on January 17, 1907, having by his will, dated October 13, 1904, given to his wife for her absolute use and benefit all his share and interest under the deed poll of appointment dated April 23, 1868; and he devised and bequeathed all his residuary estate to his trustees upon trust for sale and investment, and to hold the same upon trust to pay the income to his wife for life, and after her death in trust for his two brothers in equal shares. There was no issue of the marriage of Pryce Meyrick Pryce and the defendant.

By a deed of family arrangement dated July 27, 1889, certain hereditaments were appointed by Robert Davies Pryce and Athelstan Robert Pryce (his son) to trustees to the use of R. D. Pryce for his life, and, subject thereto, to the use of the trustees for a term of 1000 years. The trustees of the term were to raise, first, a sum of 9000*l.* after the death of R. D. Pryce, and, secondly, a sum of 4700*l.* immediately after the death of R. D. Pryce and his wife, and the trustees were to stand possessed of these two sums for all or any of the three persons therein named (of whom Pryce Meyrick Pryce was one) in such shares as R. D. Pryce should by deed or will appoint, and in default upon trust for the three persons in equal shares.

Robert Davies Pryce died on August 21, 1891, having by his will,

dated July 30, 1889, given the residue of his personal estate and also his land in America to his sons Pryce Meyrick Pryce, Arthur Hamilton Pryce, and Walter Charlton Pryce in equal shares as tenants in common. The sum of 9000*l.* appointed under the family deed of 1889 was after the death of R. D. Pryce paid over by the trustees of that deed to the three appointees, and the one-third share of the residuary estate of R. D. Pryce and of another sum of 3500*l.* charged by a codicil to the will of R. D. Pryce were also paid over to Pryce Meyrick Pryce. All these payments were made without the knowledge of the trustees of the marriage settlement of August 30, 1887. Pryce Meyrick Pryce during his lifetime disposed of substantially the whole of the funds so received by him. Under these circumstances the only fund now receivable or recoverable under the agreement in clause 5 of the marriage settlement was the one-third share of the 4700*l.* secured by the term of years in the 1889 deed of family arrangement and appointed to Pryce Meyrick Pryce by the will of his father.

Jane Sophia Pryce, the widow of R. D. Pryce, died on December 28, 1913, whereupon the interest given by Pryce Meyrick Pryce to his wife and his one-third share of the 4700*l.* fell into possession, and were now vested in the trustees of the 1849 settlement and the deed of family arrangement of 1889 respectively.

An originating summons was taken out by the trustees of the marriage settlement of August 30, 1887, asking four questions: First, whether the reversionary shares and interest to which Pryce Meyrick Pryce was beneficially entitled by virtue of the joint operation of the 1849 settlement and the deed poll of appointment of 1868, and which by deed of gift of December 12, 1904, were assured to the defendant, were effectually caught by her covenant to settle after-acquired property, and if so, secondly, whether, having regard to the fact that there had been no issue of the marriage of Pryce Meyrick Pryce and the defendant, and that the only other persons beneficially interested in the wife's trust funds were her next of kin at her death, the trustees of the settlement were bound to take steps to enforce the payment and transfer to themselves of the said shares and interests; thirdly, whether, upon the construction of clause 5 of the marriage settlement of August 30, 1887, any share or interest appointed by the will of R. D. Pryce in favour of Pryce Meyrick Pryce

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under the special power vested in R. D. Pryce by the deed of family arrangement of July 27, 1889, was effectually caught by the agreement and declaration in clause 5, and became subject to the trusts therein declared; fourthly, whether the plaintiffs should take steps to recover the share of this sum of 4700*l.*

J. M. Gover, for the trustees of the marriage settlement. I submit that the reversionary interests of the husband assured to his wife by the deed of gift of December 12, 1904, are caught by the agreement to settle her after-acquired property. Gifts by husband to wife are within such a covenant: *In re Ellis's Settlement* (1); *In re Plumptre's Marriage Settlement* (2); *Leigh-White v. Rutledge*. (3) Then, with regard to the second question asked, whether the trustees should take any proceedings to enforce the covenant or sue for damages for breach, it is clear they could do so, as the property has become trust property: *Pullan v. Koe*. (4) But the only persons interested in enforcing the covenant are volunteers, namely, the next of kin of the wife. The trustees therefore desire the direction of the Court as to what proceeding (if any) they should take. The Court will not assist volunteers: *Spickernell v. Hotham* (5); *In re D'Angibau* (6), where it was held that volunteers could not claim.

D. D. Robertson, for the defendant. Having regard to the authorities referred to, I do not contest the question that the gift by the husband to the wife is caught by the covenant, but it should not be enforced. The widow is the only beneficiary and does not desire any action to be taken, either by way of action for specific performance of the covenant, or for damages at common law for breach of covenant: *Norton on Deeds*, p. 606.

The third question raised by the summons was then argued.

J. M. Gover, for the trustees. The husband's one-third share in the 9000*l.* and 4700*l.* is caught by clause 5 in the marriage settlement. He was entitled under the will of his father although that was made in pursuance of a special power in the deed of family arrange-

(1) [1909] 1 Ch. 618.

(2) [1910] 1 Ch. 609.

(3) [1914] 1 I. R. 135.

(4) [1913] 1 Ch. 9.

(5) (1854) Kay, 669.

(6) 15 Ch. D. 228.

ment of July 27, 1889. The case comes within *In re Crawshay* (1), which is to be preferred to *Evans v. Jennings* (2), a decision the other way. The case of *Lovett v. Lovett* (3) decided that equitable estoppel was not to be applied in favour of volunteers, and that case applies by analogy.

[EVE J. In the present case the father's will is the effective document, and not the family settlement.]

In *Attorney-General v. Chapman* (4) there was a general power of appointment which was exercised in a similar way, and here it is a special power.

D. D. Robertson. These funds are not caught by the agreement to settle. The husband has become entitled under the joint operation of the deed of family arrangement and the will of his father, not under the will of his father alone, as the words of the agreement require. The principle is stated in Farwell on Powers, 2nd ed. p. 325. The case here falls clearly within *Evans v. Jennings*. (2) The same question arises whether, if these sums are caught, the agreement should be enforced.

EVE J., after stating the facts and reading the words of the settlement, held that, according to the authorities referred to, the interests and sums mentioned in the first and third questions of the summons were caught by the covenant and agreement respectively; and he reserved judgment on the question whether any proceedings ought to be taken by the trustees in respect of any of these funds.

Cur. adv. vult.

Dec. 19. EVE J. These proceedings have been instituted by the plaintiffs, the present trustees of the settlement executed on the marriage in 1887 of the late Mr. Pryce Meyrick Pryce with the defendant, who is now his widow, with the object, first, of having it determined whether certain interests in reversion assured by the husband to his wife in December, 1904, were caught by the covenant to settle the wife's after-acquired property contained in the settlement; secondly, to have it determined whether the one-third share of the husband in two sums of 9000*l.* and 4700*l.* appointed to him

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(1) [1891] 3 Ch. 176.

(3) [1898] 1 Ch. 82.

(2) (1862) 1 N. R. 178.

(4) [1891] 2 Q. B. 526.

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by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement come to in 1889 was caught by an agreement and declaration in the marriage settlement that the trustees should stand possessed of any sum to which the husband should become entitled under the will of his father upon the trusts therein mentioned; and, thirdly, to have it determined whether, in the events which have happened, the trustees ought to take any steps to recover or enforce payment or transfer to them of such, if any, of the said premises as the Court shall hold to have been caught by the said covenant or agreement respectively.

I have already held on the authority of *In re Ellis's Settlement* (1), followed in *In re Plumptre's Marriage Settlement* (2) and in *Leigh-White v. Rutledge* (3), that the interests assured by the husband to the wife were caught by the covenant to settle her after-acquired property, and, on the authority of *In re Crawshaw* (4), in preference to *Evans v. Jennings* (5), that the husband's third share of each of the two sums of 9000*l.* and 4700*l.* represented a sum of money to which he became entitled under the will of his father. His title to the one-third of the 9000*l.* accrued on his father's death in 1891, and shortly afterwards, without the knowledge of the marriage settlement trustees, he received and spent it. When he died in 1907 he left no estate beyond what was required for payment of his funeral and testamentary expenses and debts, and in these circumstances it is obvious that nothing can be gained by taking any proceedings to recover this particular sum, and no proceedings ought, therefore, to be taken in respect thereof.]

The interests given by the husband to the wife, and the husband's one-third share of the 4700*l.*, stand on a different footing from the item I have just dealt with. These have only fallen into possession on the recent death of the husband's mother, and are still outstanding in the trustees of the parents' marriage settlement and in the trustees of the deed of family arrangement respectively. The question I have to decide is whether the plaintiffs as trustees of the marriage settlement ought to take steps to obtain transfer and payment to them of these premises.

(1) [1909] 1 Ch. 618.

(3) [1914] 1 I. R. 135.

(2) [1910] 1 Ch. 609.

(4) [1891] 3 Ch. 176.

(5) 1 N. R. 178.

In considering this question it is material to note that there was never any issue of the marriage between the late Mr. Pryce and the defendant, and that, subject to the defendant's life interest in both funds, the residue of the wife's fund, after payment thereof to the defendant of a sum of 6000*l.*, is held in trust for her statutory next of kin as though she had died intestate and without ever having been married, and the husband's fund in trust for the husband, his executors, administrators, and assigns. As the defendant is tenant for life under the husband's will, no good can come of any action by the trustees to obtain payment to them of the one-third share of the 4700*l.*, and accordingly I declare that they ought not to take any steps to recover that.

The position of the wife's fund is somewhat different, in that her next of kin would be entitled to it on her death; but they are volunteers, and although the Court would probably compel fulfilment of the contract to settle at the instance of any persons within the marriage consideration (see per Cotton L.J. in *In re D'Angibau* (1)), and in their favour will treat the outstanding property as subjected to an enforceable trust (*Pullan v. Koe* (2)), "volunteers have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed": see per James L.J. in *In re D'Angibau*. (1) Nor could damages be awarded either in this Court, or, I apprehend, at law, where, since the Judicature Act, the same defences would be available to the defendant as would be raised in an action brought in this Court for specific performance or damages.

In these circumstances, seeing that the next of kin could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the settlement is not a declaration of trust constituting the relationship of trustee and cestui que trust between the defendant and the next of kin, in which case effect could be given to the trusts even in favour of volunteers, but is a mere voluntary contract to create a trust, ought the Court now for the sole benefit of these volunteers to direct the trustees to take proceedings to enforce the defendant's covenant? $\sqrt{\text{I think it ought not; to do so would be to give the next of kin by indirect means relief they cannot obtain by any direct procedure, and would in effect be}}$

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(1) 15 Ch. D. 228, 242, 246.

(2) [1913] 1 Ch. 9.

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enforcing the settlement as against the defendant's legal right to payment and transfer from the trustees of the parents' marriage settlement. The circumstances are not unlike those which existed in the case of *In re D'Angibau* (1), and I think the position here is covered by the judgments of the Lords Justices in that case.

Accordingly, I declare that the trustees ought not to take any steps to compel the transfer or payment to them of the premises assured to the wife by the deed of December 12, 1904. The costs must be taxed as between solicitor and client and paid out of the capital of the trust funds.

Solicitors: *Tylee & Co.*; *Palmer, Bull & Bartlett*, for *John A. Kingdon, Basingstoke*.

G. M.

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In re TINKLER.

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[1886 T. 447.]

Will—Construction—Settled Legacy—All Duties to be paid out of and be a Charge on Residue—Estate Duty—New Duty imposed after Death of Testator—Testamentary Expenses—Costs of Administration Action—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.

A testator who died in 1872 bequeathed to his trustees the sum of 10,000*l.* upon trusts for the benefit of his adopted daughter, A. T., for her life, and after her decease for her children and issue. He then directed that "all duties payable in respect of the said sum of 10,000*l.* given to my trustees upon trust for the benefit of my said adopted daughter, A. T., and her issue shall be paid out of and be a charge upon my residuary estate." And, after giving to his trustees a further sum of 10,000*l.* upon trust "to pay the income therefrom free of duty" to D. D. B. for her life, with a gift over, the testator gave the residue of his real and personal estate to his trustees upon trust to sell and convert and to stand possessed of the clear residue of the proceeds (after payment of testamentary expenses, debts, and legacies) upon trust to pay the income to A. S. for life, and after her decease to pay or transfer so much of the clear residue of his personal estate as might lawfully be given for that purpose to St. M.'s Hospital, and to be possessed of the residue (if any) of the produce of the conversion of his real and leasehold estates and so

much of the clear residue of his personal estate as was not effectually disposed of by the foregoing gifts and trusts upon trust for A. T. absolutely. In 1886 an order was made for the administration of the testator's estate, and the stocks, funds, and securities representing the several funds were transferred into Court, and appropriations thereof were duly made in respect of the two trust legacies of 10,000*l.* each and in respect of the pure personalty and impure personalty constituting the residuary estate. In 1889 A. T. assigned her reversionary interest under the will to the P. Company absolutely. In September, 1916, A. S. died.

On petitions presented by the P. Company and St. M.'s Hospital respectively for payment to them of their respective shares of the funds representing the residue :—

Held, that the estate duty on the first-mentioned legacy of 10,000*l.*, which under s. 14 of the Finance Act, 1914, would become payable on the death of A. T., would have to be borne by the residuary estate.

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William Alexander Tinkler, by his will dated September 2, 1872, bequeathed to his trustees the sum of 10,000*l.* upon trusts for the benefit of his adopted daughter, Alice Tinkler, for her life, and after her decease for her children and issue, with a gift over in favour of St. Mary's Hospital, Paddington. He then directed that "all duties payable in respect of the said sum of 10,000*l.* given to my trustees upon trust for the benefit of my said adopted daughter, Alice Tinkler, and her issue shall be paid out of and be a charge upon my residuary estate." And, after giving to his trustees a further sum of 10,000*l.* upon trust "to pay the income therefrom free of duty" to Dora D. Byron for her life, and after her decease upon trust for St. Mary's Hospital, the testator gave the residue of his real and personal estate to his trustees upon trust to sell and convert, and directed his trustees to pay his testamentary expenses out of the moneys to be produced by the sale of his real and leasehold and mixed personal estates. And he directed his trustees to stand possessed of the clear residue of the proceeds (after payment of testamentary expenses, debts, and legacies) upon trust to pay the income to Agnes Steel for life, and after her decease to pay or transfer so much of the clear residue of his personal estate as might lawfully be given for that purpose to St. Mary's Hospital, and to be possessed of the residue (if any) of the produce of the conversion of his real and leasehold estates and so much of the clear residue of his personal

YOUNGER J. estate as was not effectually disposed of by the foregoing gifts and trusts upon trust for Alice Tinkler absolutely.

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The testator died on September 28, 1872.

On April 24, 1873, Alice Tinkler intermarried with A. C. Lester.

In 1886 an order was made for the administration of the testator's estate, and the stocks, funds, and securities representing the several funds were transferred into Court, and appropriations thereof were duly made in respect of the two trust legacies of 10,000*l.* each and in respect of the pure personalty and impure personalty constituting the residuary estate.

By an order made by Kekewich J. on March 15, 1887, it was declared that these appropriations were duly and properly made.

In 1889 Mrs. Lester assigned her reversionary interest under the will to the Prudential Assurance Company, Limited, absolutely.

On September 23, 1916, Agnes Steel died.

Two petitions were now presented, one by the Prudential Assurance Company and the other by St. Mary's Hospital, for payment out to them of their respective shares of the funds representing the residue.

The question which arose on these petitions was whether the estate duty on the first-mentioned legacy of 10,000*l.*, which under the Finance Act, 1894, and the Finance Act, 1914, s. 14, would become payable upon the death of Mrs. Lester, ought to be borne by the residuary estate or by the legacy itself.

Colquhoun Dill, for the Prudential Company. As to the question of duty, it is submitted that the residue is not liable for any further duty in respect of the legacy of 10,000*l.* of which Alice Tinkler (now Mrs. Lester) is tenant for life. It is admitted that there is no general rule as suggested in *In re Snape*. (1) It is submitted, however, that it is necessary to have very strong words to impose such grave inconveniences as were pointed out by Eve J. in that case. In this case the appropriation for Mrs. Lester's legacy was made in 1873 (the legacy duty having been previously paid), and all the appropriations were approved by the order of Kekewich J. in 1887. This appropriation was equivalent to payment, and it makes no

(1) [1915] 2 Ch. 179.

difference that the hand which appropriates and holds the legacy is the same. The result was that after the appropriation the clause charging the residuary estate with the duties on the legacy had no further operation : *In re Palmer*. (1)

[YOUNGER J. The clause in this case seems very different from that in *In re Palmer*. (1)]

It is submitted that the judgments in that case lay down a general rule that, when once the legacy duty has been paid and funds have been appropriated to meet the legacy, the legacy is severed from the residue and must bear any further duty on it notwithstanding a provision (such as the present) charging duties on residue. There were very special words in *In re Hatch* (2) : see the last words of Sargant J.'s judgment. In *In re Stoddart* (3) the words were " pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon." There are no such words here.

No duty is payable on the death of Mrs. Steel in respect of this share of residue purchased by these petitioners. The Finance Act, 1914, protects purchasers and mortgagees of interests in expectancy from payment of further duties on such interests.

D. D. Reid, for St. Mary's Hospital. *In re Palmer* (1) decides that such a clause as the present charging duties on residue is to be construed like any other clause in a will in order to ascertain the testator's intention. It is a violent stretch of imagination to say that the testator contemplated that the Legislature would impose a further duty which would have to be paid by his executors. If he had contemplated the imposition of further duties, one would have expected that he would have made some reference to them when he came to dispose of his residuary estate.

Dighton Pollock, for the trustees of the will. It is submitted that the estate duty on this legacy is payable out of residue. The decision in *In re Snape* (4) went entirely on the question of convenience. The wording of the clause in *In re Hatch* (2) resembles the present clause more closely than the wording of the clause in *In re Palmer*. (1) That decision shows that the question is one of construction, and it turned on the words as to handing over or paying free from duties,

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(1) [1916] 2 Ch. 391.

(2) [1916] W. N. 240.

(3) [1916] 2 Ch. 444.

(4) [1915] 2 Ch. 179.

YOUNGER J. which do not occur here. *In re Stoddart* (1) is also in the trustees' favour. [He also referred to *In re Parker-Jervis*. (2)]

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YOUNGER J. I will reserve judgment on this point.

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D. D. Reid. As regards the costs, it is submitted that the costs of the petitioners St. Mary's Hospital are payable as testamentary expenses out of that part of the residue which represents impure personalty.

Colquhoun Dill. In *Attorney-General v. Lawes* (3) Wigram V.-C. states that it is a well-settled rule that, where a legacy has been severed from the bulk of an estate and becomes the subject of litigation, that particular fund, and not the general estate, is to bear the costs.

YOUNGER J. I think you will have to bear the costs as a testamentary expense.

Nov. 28. YOUNGER J. read the following judgment :—On these petitions, which are in effect for payment out of Court of funds representing the residue of a testator's estate that have become distributable by reason of the recent death of the tenant for life, a question has arisen which, with somewhat varying fortune, has in one form or another come before the Courts at least five times during the last twelve months. That question is whether estate duty first imposed by a statute passed after the testator's death and payable on subsequent devolutions of a settled legacy is by reason of a particular direction contained in the will to be borne by the residuary estate of the testator, or whether it is to be payable out of the corpus of the legacy itself in default of any apt direction to the contrary. In other words, the question is whether these petitioners are entitled to have the residuary funds paid out to them without provision made for payment or without acknowledgment by them of liability to pay the estate or any other duty which will or may become payable in respect of the settled legacy before it shall have devolved in possession upon the persons ultimately entitled thereto for an absolute interest.

(1) [1916] 2 Ch. 444.

(2) [1898] 2 Ch. 643.

(3) (1849) 8 Hare, 32, 43.

Now the testator here by his will gave a number of pecuniary and specific legacies. Some of these he expressed to be free of legacy duty; others he left to bear their own duty. He then gave two settled legacies of 10,000*l.* each. The first, with reference to which the present question arises, he gave to his trustees to hold for his adopted daughter, Alice Tinkler, for her life, with remainder for her children or other issue as she might by deed or will appoint, and in default of appointment for a son or sons at twenty-one and for a daughter or daughters at that age or marriage, and if more than one in equal shares. In default of such a child the trustees were to hold the legacy "upon trust to pay or transfer the said principal sum or the investment thereof unto the treasurer of St. Mary's Hospital, Paddington, for the purposes of that hospital," Miss Tinkler, however, being empowered to bequeath by testamentary writing the income from the trust fund or any part thereof unto or for the benefit of her surviving husband for any interest or period not exceeding the term of his life, and the will then contained a clause upon which the present question arises: "And I direct that all duties payable in respect of the said sum of 10,000*l.* given to my trustees upon trust for the benefit of my said adopted daughter Alice Tinkler and her issue shall be paid out of and be a charge upon my residuary estate." The second settled legacy of 10,000*l.* the testator gave to his trustees upon trust to pay the income therefrom free of duty (that is the only reference to duty in connection with this legacy) unto Dora Dawson Byron for her life, and after her decease upon trust to pay or transfer the said sum to the treasurer of St. Mary's Hospital, Paddington, for the purposes of that hospital.

The residue of his estate, whether it consisted of the proceeds of sale of real or copyhold estate, impure personalty or pure personalty, the testator gave to his niece Agnes Steel for her life, and upon her death, which has recently occurred, he gave his residue as follows: "Upon trust to pay or transfer so much of the clear residue of my personal estate as at the time of my decease may lawfully be given for that purpose unto the treasurer of St. Mary's Hospital, Paddington, for the purposes of that hospital and to be possessed of the residue (if any) of the produce of the conversion of my freehold copyhold and leasehold estates and so much of the clear residue of my personal estate as shall not have been effectually disposed of by the

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foregoing gifts and trusts upon trust for my said adopted daughter Alice Tinkler her executors administrators and assigns absolutely." The will contained sundry further clauses providing in effect for the marshalling of the testator's assets for the benefit of the hospital with the object of securing to the hospital, as far as his pure personalty would extend, the satisfaction in full of the benefits conferred upon it by his will.

Now the will was made as long ago as September 2, 1872. The testator died on the 28th of the same month. The legacy of 10,000*l.* was duly paid by the appropriation by the executors of securities of that amount to answer it, and by the order at the trial of the action so long ago as March 15, 1887, it was declared that such appropriation was duly and properly made. No estate duty was of course then payable or paid in respect of the legacy, and if estate duty is now to be comprehended in the words of charge which I have read, it cannot be because the testator, when he made his will, had any such duty actually in his mind. It is a safe hazard that in 1872 estate duty and settlement estate duty, and much more the new estate duty of 1914, were still far beyond the range even of prophetic vision. Accordingly, if estate duty is to be included in the expression "all duties," it must, I apprehend, be on the ground stated in *In re Parker-Jervis* (1), that on the true construction of the clause the testator, when he spoke of "all duties," did not contemplate this duty or that duty. What he must be taken to have contemplated was that the legacy should be enjoyed by each successive beneficiary without any deduction whatever in respect of any duty at all.

Now in determining whether that is the true effect of the clause it is relevant to note that at the date of the will the only duty chargeable in respect of the legacy was legacy duty, and as the rate of duty was 10 per cent. it would be payable once for all on the transfer of the fund to the trustees. The expression "all duties" is not a very apt one if a single payment of legacy duty was alone in the mind of the testator. Moreover the expression is in striking contrast to the provision as to duty in connection with the second settled legacy. There, as I have pointed out, the testator confines himself to directing the trustees to pay the income to the tenant for life "free

(1) [1898] 2 Ch. 643, 653.

of duty," and makes no further provision with reference to duty on that legacy. Further, in no other part of his will does the testator refer to any duty but legacy duty, but to that duty he makes frequent reference, a circumstance which seems to indicate that when that particular duty *alone* was in his mind he referred to it specifically. Again, the expression "all duties payable in respect of the said sum of 10,000*l.* given to my trustees for the benefit of my said adopted daughter Alice Tinkler and her issue," when contrasted with the way in which the income only of the second settled legacy is to be paid free of duty, appears to indicate that the exemption from duty was to be enjoyed by all persons interested in the first settled legacy. It was, however, strongly pressed upon me by Mr. Colquhoun Dill that these were mere words of reference, and it is true that they make no reference to the children, as such, of Miss Tinkler, nor to the hospital, nor to her husband, who might become interested in the legacy. But the strength of the words is not, I think, if I may use the figure, their own; it consists in the contrast between them and the provision as to duty in the case of the other settled legacy which immediately follows. Finally the duty is to be paid out of and to "be a charge upon my residuary estate," an expression which also rather indicates that there may be duties not immediately payable which are to remain charged on the residue.

In short, I must, it seems to me, make my choice of one of two alternatives. Either the only duty charged by these words on residue is the original legacy duty payable on the legacy, or it is every duty payable in respect of it before it reaches its final destination.

Now although I agree that the words of charge are not so strong as they might have been, nevertheless it is not, in my opinion, possible as a matter of construction on this will to confine them to legacy duty alone, for which in terms this testator knew so well how to provide. And it is now clear on the authorities that the question is one of construction in every case. "A testator," says the Master of the Rolls in *In re Palmer* (1), "may use language which is sufficient to cover a duty not in force at his death," and that principle has been adopted in subsequent cases to which I have been referred. Sargant J. applying it was able to arrive at a

(1) [1916] 2 Ch. 391, 398.

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conclusion similar to that which I have reached in *In re Stoddart* (1) and in *In re Hatch* (2), although he had, it is true, stronger words to assist him in reaching it than I have here. Peterson J. arrived at the opposite conclusion in *In re Gunn* (3) on a will, however, which did not, as it seems to me, leave it open to him to decide otherwise. As to *In re Snape* (4), the Court of Appeal in *In re Palmer* (5) must be taken to have disapproved of the only ground upon which Eve J. in that case held that the estate duty was not, but that increased legacy duty was, included in the words "free of all duty," and would apparently have extended the decision to estate duty as well. It is right, however, to note that the actual decision in *In re Palmer* (5) turned entirely upon the peculiar terms of the will there and did not directly touch the point dealt with in the subsequent cases. In *In re Palmer* (5) the Court of Appeal was able on the will to draw a line and say "All duties payable before a particular date are provided for; all payable subsequently are excluded." I can find no such dividing line in this case. It is, I think, as I have said, either all duties in respect of this legacy or legacy duty only which this will charges on the residue; and although I recognize the inconvenience of the decision and the difficulties which would have arisen if the activities of the Legislature in this matter had followed the death of the tenant for life as they did that of the testator, I must, as it appears to me, give effect to the true meaning of the words of the testator as in this will I read them.

The result is that the funds in Court representing the residue will be ordered to be paid out to the respective petitioners on their undertaking to pay their proportionate shares of the estate duty on the legacy as and when such duty becomes payable.

Solicitors: *A. E. Pratt; Tatham & Lousada; Allen & Son.*

(1) [1916] 2 Ch. 444.

(3) [1916] W. N. 283.

(2) [1916] W. N. 240.

(4) [1915] 2 Ch. 179.

(5) [1916] 2 Ch. 391.

In re BULTEEL'S SETTLEMENTS.YOUNGER
J.BULTEEL *v.* MANLEY.

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[1915 B. 3797.]

Dec. 1, 5, 6.

Bankruptcy—Marriage Settlement—After-acquired Property—Covenant to settle—Estate or Interest at Date of Settlement under Revocable Appointment—Subsequent Revocation and New Appointment—Bankruptcy Act, 1913 (3 & 4 Geo. 5, c. 34), s. 13—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 42, sub-s. 2.

The settlor at the date of his marriage was entitled in remainder to one tenth share of trust funds comprised in two indentures of settlement under a revocable appointment by his father and mother made in pursuance of a special power of appointment, and was also entitled in remainder to a sum of 1500*l.* raisable out of the trust funds (subject to a hotchpot provision) under a similar but irrevocable appointment. By the settlement made on his marriage the settlor purported to assign to trustees the said sum of 1500*l.* and "all that the tenth part or share, or other the part or share, parts or shares, to which he now is or eventually may become or be entitled of or in the trust property" comprised in the two indentures of settlement upon trusts in favour of the settlor, his wife, and children of the marriage. His father and mother afterwards revoked the appointment of the one tenth share and instead thereof revocably appointed to the settlor in remainder one ninth share of the trust funds, and his mother (who had survived his father) afterwards revocably appointed to him in remainder another one ninth share. She died in 1913 without having revoked either of the last two appointments. The settlor became bankrupt in 1914, and subject to the hotchpot provision his trustee in bankruptcy claimed these shares (which were still in the hands of the trustees of the two indentures of settlement) under the Bankruptcy Act, 1913, s. 13, which enacted that any covenant or contract made by a settlor in consideration of his or her marriage for the future settlement on or for the settlor's wife or husband or children "of property wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder," shall, if the settlor is adjudicated bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void as against the trustee in bankruptcy:—

Held, that, as to the amount of the one tenth share in which the settlor had an interest at the date of his marriage, the settlement was unaffected by the Bankruptcy enactment notwithstanding that that amount ultimately reached the trustees under a different title, but that, as to the difference in amount between the one tenth

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and first appointed one ninth share and as to the secondly appointed one ninth share, the settlement was void as against the trustee in bankruptcy.

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ADJOURNED SUMMONS.

By an antenuptial settlement dated June 20, 1859, made on the marriage of Mr. and Mrs. Bulteel, and by a postnuptial settlement dated January 27, 1881, certain trust property, which consisted of personal estate, was settled under both settlements (subject under the first settlement to a trust to pay the income to Mrs. Bulteel during the joint lives of herself and her husband, and after the death of either of them then to the survivor during his or her life, and subject under the second settlement to a life interest in Mrs. Bulteel alone) upon trust for the children or remoter issue of the marriage as Mr. and Mrs. Bulteel should by deed jointly appoint, and in default of any such appointment then as the survivor should by deed or will appoint, and in default of appointment in trust for the children of the marriage who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares. There were eleven children of the marriage who being sons attained twenty-one or being daughters attained that age or married, of whom Frederick Thomas Bulteel was one.

Revocable appointments either of the whole or part of the trust funds were from time to time made by Mr. and Mrs. Bulteel, and by a deed poll dated January 9, 1901, they appointed the whole of the trust funds comprised in both settlements, subject to their respective life interests, in tenth shares, including an appointment of one tenth share in favour of F. T. Bulteel, subject, however, in every case to a power of revocation and new appointment.

By an indenture dated August 31, 1907, in anticipation of Mr. F. T. Bulteel's marriage, Mr. and Mrs. Bulteel revoked the appointment of January 9, 1901, so far as was requisite to give effect to the appointment thereafter made, but not further or otherwise, and irrevocably appointed to F. T. Bulteel a sum of 1500*l.* to be raisable out of the trust funds subject to the trusts of the first settlement, and if and so far as the same should be insufficient for the purpose then out of the trust funds subject to the trusts of the second settlement, and directed that in default of appointment to the contrary he should not be entitled to any part of the trust

funds subject to the trusts of either settlement without bringing the said sum of 1500*l.* into hotchpot and accounting for the same accordingly ; and Mr. Bulteel thereby assigned his contingent life interest under the first settlement in the said sum of 1500*l.* unto F. T. Bulteel to the intent that he might become absolutely entitled to the said sum of 1500*l.* subject only to the life interest of Mrs. Bulteel therein, and the appointment and assignment were thereby made conditional on the marriage taking place within twelve calendar months.

By the settlement, dated September 2, 1907, made in contemplation of his marriage, which was shortly afterwards solemnized (after reciting the title of F. T. Bulteel to the sum of 1500*l.* and that he was also entitled to “ one tenth part or share or some other part or share, parts or shares,” of the trust funds, and that upon the treaty for the then intended marriage it was agreed that the said sum of 1500*l.* to which he was or would upon the then intended marriage be entitled as aforesaid “ and all other his part or share, parts or shares, of and in the trust property subject to the trusts of the Bulteel marriage settlement and of and in the trust property subject to the trusts of the postnuptial settlement ” and such other property of the said F. T. Bulteel as thereafter in that behalf mentioned should be settled upon the trusts and in manner thereafter appearing), the said F. T. Bulteel, in consideration of the said intended marriage, assigned unto the trustees of the settlement “ All that the said sum of 1500*l.* to which the said F. T. Bulteel is or will upon his now intended marriage become or be so entitled as aforesaid And all that the tenth part or share, or other the part or share, parts or shares, to which he now is or eventually may become or be entitled of and in the trust property which now is or hereafter may become or be subject to the trusts of the Bulteel marriage settlement and of and in the trust property which now is or hereafter may become or be subject to the trusts of the postnuptial settlement ” to hold the same subject to the respective life interests of Mr. and Mrs. Bulteel therein upon usual trusts in favour of the settlor, his wife, and the children of the marriage. And the settlor thereby covenanted with the trustees that all real and personal property not thereinbefore settled to which he might become entitled under the will of his mother or by gift from her in

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By a deed poll dated January 3, 1908, Mr. and Mrs. Bulteel revoked the appointments of January 9, 1901, including the appointment of the one tenth share of the trust funds thereby made in favour of F. T. Bulteel, and by the same instrument made new appointments, subject to their respective life interests, of so much of the trust funds comprised in both settlements as had not previously been irrevocably appointed, in ninth shares, including an appointment of one ninth share in favour of F. T. Bulteel, and including an appointment of another one ninth share in favour of the children of Percy Bulteel, another son of the marriage, reserving, however, once again a power of revocation and new appointment.

By a deed poll dated December 7, 1911, Mrs. Bulteel (who had survived her husband) revoked the appointment of January 3, 1908, so far as related to the one ninth share thereby appointed in favour of the children of Percy Bulteel, and revocably appointed the same one ninth share in favour of F. T. Bulteel.

Mrs. Bulteel, the surviving parent, died on May 27, 1913, without having revoked either of the two last-mentioned appointments. On October 20, 1914, a receiving order in bankruptcy was made against F. T. Bulteel, and on November 23, 1914, he was adjudicated a bankrupt and a Mr. Pearce was appointed his trustee in bankruptcy.

The trustee in bankruptcy claimed the firstly appointed one ninth share, after deducting the said sum of 1500*l.*, and the whole of the secondly appointed one ninth share under the Bankruptcy Act, 1913, s. 13 (1); and this was an originating summons raising

(1) The Bankruptcy Act, 1913, s. 13, enacts: "Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children of

property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bank-

(inter alia) the question whether the assignment by F. T. Bulteel was void as against his trustee in bankruptcy so far as related to these two one-ninth shares.

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H. F. Greenland, for the summons.

Clauson, K.C., and *Whitmore Richards*, for the trustee in bankruptcy of F. T. Bulteel. At the date of his marriage the settlor had no interest in the two one-ninth shares, and as to these shares therefore the assignment is only operative as a covenant to settle binding the shares when they came into existence by virtue of the subsequent appointments. The case therefore falls within the Bankruptcy enactment except to the extent to which the settlor had an "estate or interest" in the property. We submit that he had no such estate or interest in either of these one ninth shares. The interest which he had at the date of his marriage was a defeasible interest in remainder in one tenth share under the revocable appointment of January 9, 1901. His interest in that property was destroyed by the revocation of the appointment. The one tenth share, and not the entire trust fund, was the "property" in which the settlor had an interest within the meaning of the enactment. There appears to be no direct authority on the construction of the enactment, but the case is covered in principle by *Lovett v. Lovett* (1) and *Sweetapple v. Horlock* (2) (approved in the Privy Council in *Jackson v. Commissioner of Stamps* (3)); and see per Stirling L.J. in *Attorney-General v. Earl Selborne* (4) and per Joyce J. in *In re Walpole's Marriage Settlement*. (5) The decision of Malins V.-C. under the Bankruptcy Act, 1869, s. 91, in *In re Andrews' Trusts* (6) will be cited against us, but we submit that that case was wrongly decided. In any case it is an authority against us only to the extent of the one tenth share to which the settlor was entitled at the date of his marriage, and not as to the difference between the one tenth

ruptcy, be void against the trustee in bankruptcy"

The Bankruptcy Act, 1914 (which came into operation on January 1, 1915), repeals the above enactment, but re-enacts it in identical language by s. 42,

sub-s. 2.

(1) [1898] 1 Ch. 82.

(2) (1879) 11 Ch. D. 745.

(3) [1903] A. C. 350, 354.

(4) [1902] 1 K. B. 388, 398.

(5) [1903] 1 Ch. 928, 932.

(6) (1878) 7 Ch. D. 635.

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share and the first appointed one ninth share, nor as to the secondly appointed one ninth share, since the settlor in that case at the date of his marriage was entitled in default of appointment to one third share, and that amount, and no more, was actually appointed to him: *Wace on Bankruptcy* (1904 ed.), p. 243.

Mathew, K.C., and *Austen-Cartmell*, for the trustees of the marriage settlement. Admitting that so far as relates to the two one-ninth shares the assignment has no higher operation than a covenant to settle, we claim both the first appointed and the secondly appointed one-ninth shares. The Bankruptcy enactment has not the extended operation contended for. It is enough to protect whatever share the settlor may become entitled to in the trust funds if at the date of the covenant he has any estate or interest in the property. The property within the meaning of the Bankruptcy enactment is the entire trust property subject to the two settlements. The words "any estate or interest" in the Bankruptcy enactment are used as distinct from the word "property," and it is impossible in such a case to distinguish between the part in which a settlor has an interest and the remainder of the trust property. The settlor's interest at the date of his marriage is therefore sufficient to take the case out of the enactment as regards the whole of the trust funds. The cases cited against us are not in point, as they all turned on the construction of the settlement, and not on the construction of the Bankruptcy enactment. On the other hand, *In re Andrews' Trusts* (1) is an express authority in our favour, and is not to be limited in the way suggested so as only to protect the amount to which the settlor was entitled at the date of his marriage.

Ashton Cross, for other parties.

Clauson, K.C., in reply. The terms of the assignment in the present case sufficiently separate the property in which the settlor had an interest from the property in which he had no interest, and even assuming that the settlement is protected as to the amount of the one tenth share, that affords no protection as to the remainder of the property.

Mathew, K.C., on this point referred to the recitals in the marriage settlement.

Dec. 6. YOUNGER J. The question which I have to determine on this summons is whether an assignment by a settlor on the occasion of his marriage of all his interest, present, prospective, and possible, in the trust funds comprised in the settlements made in relation to the marriage of his parents is to any and, if so, to what extent void under s. 13 of the Bankruptcy Act, 1913, now repealed but re-enacted in identical language by s. 42, sub-s. 2, of the Bankruptcy Act, 1914, the settlor having become bankrupt before the transfer to the trustees of his own marriage settlement of the trust funds which he purported to assign. The settlements from which these trust funds proceeded were settlements made in relation to the marriage of Mr. and Mrs. Thomas Bulteel. The first was an antenuptial settlement of June 20, 1859, and the second was a postnuptial settlement of January 27, 1881. [His Lordship stated the facts above set out and continued.]

It is quite clear, and I think it is not disputed at the Bar, that all the trust funds to which, in the events which I have stated, F. T. Bulteel became entitled under the appointments made in his favour by his parents or by his mother have been, so far as words can assign them, aptly transferred and assigned to the trustees of his marriage settlement. The question that has to be determined is whether the Bankruptcy enactment to which I have referred has, and if at all to what extent, made that assignment void. The enactment is as follows: [His Lordship here read the enactment and continued.]

The first point to be noticed with reference to that section is that there is not in terms in this marriage settlement any covenant or contract by the settlor to settle his shares in the trust funds. The marriage settlement is in form an assignment of the settlor's shares in the trust funds, and is not in form a covenant to assign. But, inasmuch as a covenant or contract to assign would in equity have bound the property when it came into actual existence, and the assignment itself has no higher operation, I feel no doubt that the assignment is a covenant or contract within the provisions of the Bankruptcy enactment.

The next material point in connection with that enactment is to ascertain the property in which at the date of his marriage the settlor had an estate or interest. It is quite clear that he had

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a vested estate or interest in the sum of 1500*l.* subject to the life interest of his mother of which he could not be deprived by any subsequent appointment ; it is also, I think, clear that, subject to bringing that sum into account, he had a vested interest in the one tenth share of the trust funds which had been appointed to him on January 9, 1901, subject, however, to the possibility of that vested interest being defeated by the revocation of the appointment under which he took it. There was not, however, at the date of his marriage any further portion of the settled funds in which he had by way of expectation anything that could properly be described as an estate or interest. These remaining funds at that date all stood appointed to other members of the family, revocable though the appointments or most of them were. In these circumstances it is, I think, reasonably plain on the construction of the Bankruptcy enactment that to the extent of the trust funds in which he could properly be said to have an estate or interest, namely, the sum of 1500*l.* and a one-tenth share of the property then under appointment to him, both of which have in the result passed to the trustees, the settlement is unaffected by the statute. For, in my opinion, the result of the enactment is at least this : that if a settlor has any estate or interest in property at the date of his marriage, then that property passes to the trustees of the settlement comprising it unaffected by this enactment, even although the property ultimately reaches them under some title other than that derived from the estate or interest actually possessed in the property by the settlor at the relevant moment. In other words, while a settlor may not by his marriage settlement withdraw from his creditors in the event of his bankruptcy property which he may acquire after his marriage, still he may so deal with property, and if it in the event and by any title materializes may effectually so deal with it, if at the date of his marriage he has an actual interest in it, however remote or contingent. This view of the enactment renders inapplicable to the case such decisions as those in *Sweetapple v. Horlock* (1) and *Lovett v. Lovett* (2) upon which counsel for the trustee in bankruptcy placed some reliance.

But it was contended by Mr. Mathew, on behalf of the trustees of the marriage settlement, that the Bankruptcy enactment has

(1) 11 Ch. D. 745.

(2) [1898] 1 Ch. 82.

an even more restricted operation than that which I have attributed to it, and he says that, if a settlor has such an estate or interest in any part of the property included in his covenant or contract, then that estate or interest protects from the future trustee in bankruptcy not only the property to which it alone extends, but all the property which the settlor may by the covenant or contract bind himself to assign, and that whether he has or has not any estate or interest in the remainder of the property. I cannot accept that view of the enactment. Nothing, in my opinion, is protected from the trustee in bankruptcy except property in which at the date of the marriage the settlor has some estate or interest. So far as relates to any further property bound by the covenant or contract, the effect is the same as if the settlor had no estate or interest at all in any of the property. *In re Andrews' Trusts* (1) is in my opinion quite consistent with this view, inasmuch as in that case the interest which the covenantor had at the date of his marriage was an interest in the whole of the third share which was in point of fact comprised in his covenant. And that view is also, I think, confirmed by an Irish case (*In re M'Crohan* (2)), where a settlement was declared void so far as it purported to charge after-acquired property in which the settlor had at the date of his marriage no interest at all. The result in the present case will be to make the assignment void so far as it extends to the difference between the one tenth share and the one ninth share which was appointed to F. T. Bulteel subsequently to the date of the marriage settlement, and also so far as it extends to the one ninth share originally appointed in favour of the children of Percy and subsequently by the appointment of December 7, 1911, appointed to F. T. Bulteel himself.

I should add that on the true construction of the marriage settlement in the present case the different items of property seem to me to be sufficiently separated in the terms of the assignment itself to enable the Court to say in which part of the property the settlor had, and in which part he had not, any estate or interest. I agree with Mr. Mathew in thinking that it is conceivably possible that when a settlor has some interest in the property an assignment might in circumstances similar to the present be so framed as to make it extremely difficult, and it might be impossible, to confine

(1) 7 Ch. D. 635.

(2) (1892) 31 L. R. Ir. 225.

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YOUNGER J. that interest to a part only and not to treat it as extending in some relevant sense to the whole of the property. In the present case, however, I have no such difficulty. The parcels comprised in the marriage settlement are easily severable, and the result, as I have stated, is that the assignment is effective only so far as relates to the 1500*l.* and the amount of the one tenth share as originally appointed in favour of the settlor.

BULTEEL'S SETTLEMENTS, *In re.*
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Solicitors : *Loughborough, Gedge, Nisbet & Drew, for Pearless, Sons & de Rougemont, East Grinstead ; Rawle, Johnstone & Co., for Percy T. Pearce, Plymouth ; W. Gipps Kent & Son, for Eric R. Ward, Plymouth ; Mann & Crimp, for Hacker & Michelmores, Newton Abbot.*

A. C.

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[1914 C. 3181.]

N. v. 3, 6, 7, 8.

Voluntary Settlement—Covenant to pay off Mortgage—General Power of Appointment—Power of Revocation—Undertaking by Settlor to transfer Property in Satisfaction of Covenant—Acceptance on behalf of Trustees—Consideration—Death of Settlor before Transfer—Imperfect Gift—No Claim by Executors—Legal Interest got in by Trustees—Subsequent Claim by Executors.

A voluntary settlement of various properties numbered consecutively contained a covenant by the settlor to apply specific funds in the discharge of a mortgage on the property numbered 8 to the intent that property 8 might be held on the trusts of the settlement free of the mortgage.

The trusts of the settlement were "for such persons and for such purposes and generally in such manner" as the settlor should from time to time during his lifetime in writing direct, and subject thereto upon trust for certain beneficiaries after his death. The settlement contained the usual power of revocation by deed.

Instead of paying off the mortgage on property 8 the settlor applied the specific funds in purchasing three reversions which he subsequently arranged with the trustees' solicitor to put into settlement in satisfaction of his covenant.

By a letter of directions drafted by the trustees' solicitor and subsequently confirmed by deed poll the settlor directed the trustees to hold property 8 subject to the mortgage, in lieu of the

same being paid off by him, and subject to that mortgage he directed them to hold the said premises upon the trusts of the settlement, and he thereby undertook to assign the three reversions to the trustees upon the trusts of the settlement.

This undertaking was accepted by the trustees' solicitor on behalf of the trustees in satisfaction of the covenant.

The settlor died five months later without having assigned the second and third reversions, but his executors, not realizing that there could be any possible doubt as to the effective operation of the letter of directions, treated them as belonging to the trustees, who paid the policy premiums on both reversions, and in the case of the third reversion paid off a mortgage and took a reconveyance from the mortgagee.

Nine years after the settlor's death the executors claimed the second and third reversions on the ground that the settlor's undertaking to assign them was only an imperfect voluntary gift. They offered to redeem any mortgage that the trustees had paid off. The trustees thereupon brought this action for a declaration that the two reversions belonged to them :—

Held, that the settlor had shown no intention of revoking his voluntary covenant, but merely intended to satisfy his liability thereunder by undertaking to assign the three reversions, and the acceptance by the trustees' solicitor of that undertaking in satisfaction of the voluntary covenant was sufficient consideration to support the letter of directions and the undertaking therein contained.

Ex parte Berry (1812) 19 Ves. 218 applied.

Semble. Even if the undertaking had been purely voluntary, and as such an imperfect gift, the trustees could have held their legal interest in the third reversion against the executors.

Strong v. Bird (1874) L. R. 18 Eq. 315, 318, discussed.

WITNESS ACTION.

By a voluntary settlement dated December 4, 1902, and made between the settlor of the one part and the trustees—namely, the plaintiffs and the defendant Walter Hungerford—of the other part, twenty-four properties numbered 1 to 24 and subject to various incumbrances were assured to the trustees upon the trusts thereafter declared.

Clause 2 provided that the trustees should hold the premises upon trust for such persons and for such purposes and generally in such manner as the settlor should from time to time during his lifetime in or by writing under his hand direct.

Clauses 7 to 16 provided that after the settlor's death and subject to the trusts aforesaid the trustees should hold the trust premises

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ASTBURY J. upon certain trusts for Annie Broughton and the settlor's daughters
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By clause 20 the settlor covenanted with the trustees that he would pay and apply all capital moneys to be received by him in respect of a sum of 1000*l.* due and owing to him from Sealey Hole & Co., or which he might receive in respect of the proceeds of sale of certain freehold premises known as Caledonian House, Cape Town, after satisfying a 6500*l.* mortgage thereon, in the payment and discharge or the payment or discharge pro tanto of a certain sum of 2000*l.* due to Edith Smyth upon the security of property 8 and of the sum of 2000*l.* due to Gerald Surman upon the security of properties 11 to 16, to the intent that the respective properties might thenceforth be held upon the trusts of the settlement freed and discharged from the Smyth and Surman mortgages and all claims and demands thereunder respectively.

Clause 30 empowered the settlor at any time or times thereafter by any deed or deeds revocable or irrevocable wholly or partially to revoke and make void the uses, trusts, powers, and provisions therein contained of and concerning the trust premises or any part thereof, and to declare such new and other uses and trusts of and concerning the same or any part thereof as he might think fit for the benefit of himself the settlor, his heirs, executors, or administrators, or any other person or persons.

During the year 1903 the settlor received the 1000*l.* from Sealey Hole & Co. and the proceeds of sale of Caledonian House. He paid off the Surman 2000*l.* mortgage, but instead of paying off the Smyth 2000*l.* mortgage he invested the balance of over 2000*l.* in the purchase of three securities. These were, first, a reversionary interest in leaseholds called the Weldon reversion; secondly, a reversionary share of residuary estate and a policy called the Giles reversion; and, thirdly, a reversionary interest in 8000*l.* Consols and a policy called the Baker reversion. On purchasing the Baker reversion the settlor had left 800*l.*, subsequently reduced to 400*l.*, on mortgage to the vendors, the National Mutual Life Assurance Society. The reversions subject to this 400*l.* mortgage were worth more than 2000*l.*

The settlor wished to put these reversions into settlement in lieu of paying off the Smyth mortgage. Having also contracted

with Georgina Foott to purchase a charge of 2600*l.* on the Colthurst ASTBURY J. estates for 1650*l.*, and wishing to give the settlement the benefit of that contract, he arranged with his solicitor, Nutting, who was a trustee and also acted for his co-trustees, that the Colthurst charge should be assigned by Georgina Foott direct to the trustees, and that he and they should mortgage it and the Weldon reversion to Robinson for 1670*l.*, which amount the settlor intended to be paid out of the settled property No. 1. He also arranged to assign the three reversions to the trustees.

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On November 18, 1904, Georgina Foott assigned the Colthurst charge to the trustees, and on November 19, 1904, the settlor and the trustees mortgaged the charge and the Weldon reversion to Robinson for 1670*l.*, which was paid to the settlor, who covenanted for payment of principal and interest. It was provided that on payment off by the settlor, his heirs, executors, administrators, or assigns, the whole of the mortgaged premises should be reconveyed to the trustees.

On November 30, 1904, Nutting wrote to the settlor enclosing, as arranged, a letter to the trustees agreeing to assign the three reversions to them instead of paying off the Smyth mortgage.

By this letter, dated December 1, 1904, addressed to the trustees and hereinafter called the letter of directions, after reciting the covenant, the application of the moneys in paying off the Surman mortgage only and in purchasing the three reversions, the assignment of the Colthurst charge to the trustees, the mortgage of that charge and the Weldon reversion to Robinson, the settlor's intention that the Robinson mortgage should be paid out of the settled property No. 1, and that the three reversions should be assigned to the trustees, and that the same together with the Colthurst charge should be held by them upon the trusts of the settlement, the settlor, in exercise of the powers contained in the settlement, directed the trustees to hold property 8 subject to the Smyth 2000*l.* mortgage, in lieu of the same being paid off by him, and subject to that mortgage he directed his trustees to hold the said premises upon the trusts of the settlement. He further directed the trustees to pay off Robinson's 1670*l.* mortgage out of property 1, or such part as they might receive, and concluded: "And I hereby undertake and agree to assign to my trustees the said securities set out in the

ASTBURY J. said schedule hereto which together with the said charge on the
1916 Colthurst estates shall be held by my said trustees upon the trusts
CARTER declared by and subject to the powers provisions and agreements
v. contained in and declared by my said settlement." The schedule
HUNGER- comprised the three reversions, the Baker reversion being stated
FORD. to be subject to a 400*l.* mortgage to the National Mutual Life
Assurance Society.

The settlor signed the above letter and forwarded it to Nutting on December 3, 1904, with a covering letter dictated by him to the defendant Winspeare Hungerford, stating " Herewith I beg to hand you letter signed. Please understand that it is my intention to pay off 400*l.* due to the National Mutual Assurance Co. and then to withdraw the reversionary interest of William Rawdon Weldon and also the Colthurst mortgage. The reversionary one fourth share of Mrs. M. A. S. Giles, 2400*l.* Consols and Delap's mortgages which I paid off will fully cover my covenant in the settlement."

The settlor in fact paid off 200*l.* of the 400*l.* mortgage, but did not carry out his intention of withdrawing any securities. On the contrary, on December 28, 1904, in exercise of the powers of the settlement, he confirmed the letter of directions by a deed poll.

By his will, dated February 25, 1904, the settlor devised and bequeathed his residuary real and personal estate to the executors and trustees therein named as to two thirds in trust for his sons and as to one third in trust for his daughters, and by a second codicil dated November 28, 1904, he appointed the defendants and Macnamara (since deceased) his executors and trustees in lieu of the executors named in the will.

The settlor died on May 21, 1905. It was tacitly assumed that the letter of directions was a binding document, but questions arose (*inter alia*) as to whether, having regard to the settlor's letter of December 3, 1904, the Weldon reversion and the Colthurst charge remained subject to the settlement, and, if not, whether the trustees were bound to pay the 1670*l.* mortgage out of property 1. A further question was whether the 200*l.* paid off the mortgage on the Baker reversion after the letter of directions was repayable by the trustees.

The executors and trustees agreed to submit the questions to R. J. Parker (now Lord Parker) and to accept and act upon his opinion.

On February 8, 1906, R. J. Parker advised that the Weldon ASTBURY J. reversion and the Colthurst charge were subject to the settlement notwithstanding the letter of December 3, 1904, which was merely a statement of what the settlor intended to do at some future time, and not a present exercise of his power of appointment. This view was strengthened by the fact that the letter of directions was confirmed by the deed poll of December 28, 1904. The trustees must, however, provide for the discharge of the 1670*l.* Robinson mortgage out of the settled property. As to the 200*l.* paid off the mortgage on the Baker reversion, the settlor was in the position of a life tenant discharging a mortgage on the inheritance, and the mortgage was kept alive for his benefit. The 200*l.* therefore belonged to the executors.

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On March 28, 1906, in pursuance of this opinion, the trustees repaid the 200*l.* to the executors, and from that time no one doubted that the three reversions were included in the settlement. All parties dealt with the properties on that footing, the trustees paying the premiums and mortgage interest and letting the leaseholds when the Weldon reversion fell in.

In 1907 an administration action, "*In re Baker's Estate*," was proceeding in Ireland. The trustees, as parties attending, produced the settlement and the letter of directions in proof of their title to the Baker reversion, and on July 5, 1907, the chief clerk certified that the trustees were entitled to the Baker reversion to hold on the trusts of the settlement. The executors did not attend the proceedings or make any claim to this reversion, which they believed belonged to the trustees.

On February 13, 1908, the trustees, having paid off the mortgage on the Baker reversion, took a reconveyance from the mortgagees. The reconveyance was made supplemental to the mortgage and recited that the equity of redemption was vested in the trustees, as every one then believed to be the fact.

On January 19, 1909, the Weldon reversion fell in, and the trustees of the will under which it was derived required the settlor's executors to join in the assignment to the settlor's trustees. The executors declined to do so unless paid 415*l.*, which they claimed as a lien on this reversion on a complicated contention which need not be stated. The point was submitted to Jessel, K.C., who on June 15, 1910,

ASTBURY J. advised that the executors' contention was untenable, but he pre-
 1916 faced his opinion by saying "For the purpose of this case I assume
 CARTER that no point is raised on the ground that the settlor did not himself
 v. assign to the trustees the property referred to in the schedule to
 HUNGER- the letter of directions of December 1, 1904, and that the letter of
 FORD. directions must therefore be regarded as an incomplete voluntary
 settlement on the doctrine of *Ellison v. Ellison* (1) and *Milroy v.*
Lord. (2) If this were the case the confirmation under seal dated
 December 28, 1904, would not operate as such an assignment.
 Probably my assumption is correct and the letter of directions and
 consequential confirmation must be regarded as having been made
 for valuable consideration."

This was the first time any shadow of doubt had been cast on
 the operation of the letter of directions.

On July 29, 1910, the trustees paid off the Robinson mortgage
 and took a reconveyance of the Colthurst charge and the Weldon
 property.

On November 11, 1914, the executor Winspeare Hungerford
 commenced an action in Ireland against the trustees for a declara-
 tion that the three reversions formed part of the settlor's estate
 and for consequential relief. This action, however, stood over
 pending the decision in the present English action.

On November 30, 1914, the plaintiffs, who with the defendant
 Walter Hungerford were the trustees, commenced this action
 against the executors for a declaration that, in the events that had
 happened, the three reversions belonged to the trustees on the
 trusts of the settlement and did not form part of the settlor's
 estate.

The executors contended that there was no consideration for
 the covenant in the voluntary settlement, or for the settlor's under-
 taking to assign the three reversions in satisfaction of that covenant,
 and the undertaking was therefore unenforceable. They offered
 to redeem the mortgages (if any) that the trustees had paid off,
 and claimed that subject to that redemption the three reversions
 belonged to the executors. They alleged that any such payments
 off were made without their knowledge or consent.

(1) (1802) 6 Ves. 656; 2 Wh. & (2) (1862) 4 D. F. & J. 264.
 T. L. C., 8th ed. p. 853.

At the hearing the executors admitted that, having regard to ASTBURY J. the special form of the proviso for redemption in the Robinson mortgage and the subsequent reconveyance of the Colthurst charge and the Weldon property to the trustees in accordance therewith, they could not contest the trustees' title to the Weldon property.

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The two points calling for report were, first, whether there was any consideration to support the letter of directions, and secondly, if it was purely voluntary, whether the trustees could at all events hold their legal interest in the Baker reversion against the executors. A further contention was raised that the first point was impliedly covered by R. J. Parker's decision, but on a careful examination of the case and opinion the judge held that it was neither raised nor decided.

Cunliffe, K.C., and *Whitmore Richards*, for the plaintiff trustees. The covenant to apply the two specific funds, namely, the 1000*l.* debt and the Caledonian House proceeds, in the discharge of the Smyth and Surman mortgages on the settled property was a declaration of trust of those funds: *Ex parte Pye* (1); and the properties purchased therewith became subject to the same trust.

Secondly, the covenant was a condition on which the trustees accepted the trust subject to the liability on those mortgages. It was therefore a covenant for value: *Price v. Jenkins*. (2) Even if it was a voluntary covenant the trustees and the beneficiaries could have recovered damages for breach: *Clough v. Lambert*. (3) The settlor's undertaking in the letter of directions to assign the three reversions was given and accepted in satisfaction of this liability, and in reliance thereon the trustees accepted the three reversions cum onere and paid the premiums and mortgage interest. This was valuable consideration and the undertaking was specifically enforceable: *Townend v. Toker*. (4)

Thirdly, in the case of the Baker reversion the executors stood by and allowed the trustees to prove their title in the Irish Court. The trustees afterwards paid off the mortgage and took a reconveyance of the legal interest. That legal interest cannot now be disturbed.

(1) (1811) 18 Ves. 140, 149.

(3) (1839) 10 Sim. 174.

(2) (1877) 5 Ch. D. 619.

(4) (1866) L. R. 1 Ch. 446, 458-460.

ASTBURY J. *Micklem, K.C.*, and *Dighton Pollock*, for the executors. The
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voluntary covenant to apply the specific funds in paying off the Smyth and Surman mortgages was not a declaration of trust of those funds: *Milroy v. Lord* (1); *Richards v. Delbridge* (2); so that there is no case of tracing trust property into the three reversions.

Secondly, the settlement was a mere voluntary disposition in the daughters' favour. The settlor was empowered to alter the trusts in any way by writing under clause 2, or to revoke them by deed under clause 30, so that the settlement was wholly ambulatory until his death. During his life he had complete dominion over the property. He could have appointed property 8 with the benefit of the covenant to himself under clause 2. That would clearly have extinguished his covenant. Instead of doing that he directed the trustees to hold property 8 subject to the Smyth mortgage, in lieu of his paying it off, and subject to that mortgage to hold it upon the trusts of the settlement. That showed a clear intention to put an end to the covenant, and any technical objection that a covenant can only be revoked by deed is removed by the confirmatory deed poll. He then undertook to assign the three reversions, no doubt as a solatium for revoking his covenant. But throughout he was acting with full dominion over the property. There was and could have been no bargain with the trustees, who had no rights to give up. They had merely to obey the settlor's directions, whatever they were, and his undertaking to assign the three reversions was purely voluntary.

Owing to the special form of the proviso for redemption in the Robinson mortgage, which was tantamount to an assignment of the Weldon reversion, and the reconveyance of the Colthurst charge and the Weldon property to the trustees in accordance therewith, the executors have given up their claim to the Weldon property. But the Giles and Baker reversions belonged to the settlor at his death, and the rights of the beneficiaries under his will cannot be affected by the fact that the executors, misunderstanding their position and not realizing that the settlor's voluntary undertaking to assign these reversions to the trustees was unenforceable, stood by and did not assert their claim. That does not amount to acqui

(1) 4 D. F. & J. 264, 274.

(2) (1874) L. R. 18 Eq. 11.

escence : *La Banque Jacques-Cartier v. La Banque D'Epargne de Montreal* (1) ; *Life Association of Scotland v. Siddal*. (2)

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Thirdly, the so-called reconveyance of the Baker reversion to the trustees does not better their position. They were not interested in the equity of redemption or entitled to redeem, and the so-called reconveyance could not therefore amount to more than a transfer, leaving the rights of the parties really entitled to redeem unaffected. The trustees had merely a nudum pactum which gave them no equity.

[ASTBURY J. Suppose the settlor or his executors had assented to the reconveyance.]

If the settlor had assented it would no doubt have been a gift of the equity of redemption inter vivos. But the executors could not assent. It would have been a clear breach of trust. They were in fact not parties to *In re Baker's Estate*, and neither they nor their beneficiaries were bound by the finding of the chief clerk, which on the face of it was erroneous, as no undertaking to assign, even if enforceable, can pass the property.

*Cunliffe, K.C.*, in reply. The letter of directions did not in any way purport to revoke the settlement or the covenant, which could only be revoked by deed. It was at most an appointment under the settlement as it stood and an undertaking to satisfy the covenant by assigning the three reversions. The deed poll confirmed the letter of directions simpliciter and did not revoke the settlement in any way. This was a far simpler method of effecting the settlor's intention than a deed of revocation and reappointment. Under such a deed the settlor could no doubt have made himself master of the situation and dictated his own terms to the trustees. But short of that the trustees had rights under the covenant, and by accepting the three reversions as satisfaction under the simpler plan they did in fact give consideration, and the Court is not concerned with its adequacy.

Arrears due under a voluntary bond are a valuable consideration which will sustain a conveyance against creditors : *Gilham v. Locke* (3) ; and the surrender of a voluntary bond is a consideration that will sustain a substituted bond against creditors : *Ex parte*

(1) (1887) 13 App. Cas. 111, 118. (2) (1861) 3 D. F. & J. 58, 74.

(3) (1804) 9 Ves. 612.

ASTBURY J. *Berry*. (1) The bankruptcy decisions in *In re Parry* (2), *In re*  
 1916 *Pope* (3), and *In re Collins* (4) turned on the words "purchaser  
 CARTER for valuable consideration" in s. 47 of the Bankruptcy Act, 1883  
*v.* (46 & 47 Vict. c. 52), and are not in point here.

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Again, in the case of the Baker reversion we are entitled to rely on our legal interest, even if we had no strict technical right to get it in. The principle in these cases is that the Court does not assist an imperfect voluntary gift, but if the donee innocently obtains the property aliunde there is no equity in the donor or his representatives to take it away from him: *Strong v. Bird*. (5)

In the present case the executors have not only stood by and allowed us to obtain the Baker reversion, but they have asked us to assume liability for the mortgage, and accepted repayment of the 200*l.*, part thereof, on that footing. They cannot now dispute our title: *Dillwyn v. Llewelyn* (6); *Attorney-General to Prince of Wales v. Collom*. (7)

*Micklem, K.C.*, in rejoinder. In *Ex parte Berry* (1) the obligee was the owner of the money secured by the bond, so that the surrender of the bond was a consideration for the substituted bond. In the present case the whole property, including the benefit of the covenant, was subject to the covenantor's general power of appointment under clause 2 which he exercised, and there was no room for any bargain.

*Strong v. Bird* (5) is merely an instance of a donor inadvertently completing an imperfect gift. That is exactly what the settlor did not do here, and the trustees, whether with or without the consent of the executors, could not complete the gift after the settlor's death.

ASTBURY J. (after stating the facts). The questions are, first, whether there was any valuable consideration to support the letter of directions, in which case the trustees succeed, and secondly, if there was no such consideration, whether the trustees can at all events hold their legal interest in the Baker reversion against the executors.

The trustees contended that the settlor's covenant to apply

(1) 19 Ves. 218.

(4) (1914) 112 L. T. 87.

(2) [1904] 1 K. B. 129.

(5) L. R. 18 Eq. 315, 318.

(3) [1908] 2 K. B. 169.

(6) (1862) 4 D. F. & J. 517.

(7) [1916] 2 K. B. 193.

specific funds in the discharge of specific mortgages on the settled property was a declaration of trust of those specific funds. But that contention is unsound: *Milroy v. Lord*. (1)

The real question is whether in all the circumstances there was sufficient consideration to support the letter of directions. The settlement was admittedly voluntary. By clause 20 the settlor covenanted to apply specific funds in paying off certain mortgages on certain of the settled properties to the intent that they might thenceforth be held upon the trusts of the settlement freed and discharged from those mortgages. Under clause 2 it was competent for the settlor in writing to direct that the whole or any portion of the settled property should be held in trust for himself or any other person. The daughters and other beneficiaries took subject to that clause. Under clause 30 it was competent for the settlor by deed to revoke the trusts and declare new trusts.

Until, however, the settlement was altered or the trusts revoked the settlor remained liable on his covenant. That covenant was to apply specific funds in a particular manner. The settlor only applied a portion of the funds in part satisfaction of his covenant and purchased the three reversions with the balance. On his attention being called to the covenant he arranged with Nutting, who was acting for the trustees, that instead of revoking the settlement by deed, as he was entitled to do, or taking any property out of settlement, he would substitute the three reversions in lieu of paying cash under his covenant.

I am aware that if so minded the settlor could have revoked the trusts of property 8 by deed and declared new trusts thereof. But until he did that he was bound by his covenant to apply the specific funds in payment of the mortgage on property 8. The three reversions were themselves subject to burdens. I think that the arrangement made between the settlor and Nutting, acting for the trustees, was that the settlor, instead of revoking the covenant by deed, should still remain liable on the covenant, but should be allowed to satisfy his liability by handing over the three reversions cum onere to the trustees instead of paying cash in discharge of the Smyth mortgage, and Nutting, acting for the trustees, agreed to accept them in satisfaction accordingly.

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ASTBURY J. I cannot find any evidence that the settlor intended to escape from his liability to make good the amount representing the liability under his covenant or its equivalent, and it would be difficult to hold that by signing the letter of directions the settlor had escaped liability from a covenant that he could only revoke by a deed under seal. In these circumstances I think that Nutting's acceptance of the settlor's undertaking to assign the three reversions in substitutional satisfaction of his covenant was sufficient consideration for the letter of directions, especially as that document was not under seal.

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The deed poll merely confirmed the intention of the letter of directions, and neither party had any idea of revoking any part of the settlement or declaring new trusts. The consideration was no doubt small, but I am not concerned with its adequacy. I think it was sufficient within *Gilham v. Locke* (1) and *Ex parte Berry* (2), which are not affected by *In re Parry*. (3) On these grounds I think that the executors' contention fails and that the three reversions are included in the settlement.

In these circumstances it is not necessary to decide the second point, namely, the interesting question on the Baker reversion. But, assuming that I am wrong in holding that there was sufficient consideration for the letter of directions, the difficult question remains whether it is not too late for the executors to raise this point as regards the Baker reversion. The legal interest was got in by the trustees on February 13, 1908. They not only acted honestly, but with full knowledge that the executors made no claim, and left them to take such steps as they might be advised to get in and deal with this reversion as part of the trust property. It is true that in adopting this attitude the executors were unaware that any question of the effectual operation of the letter of directions could be raised. But that was not a matter for the trustees to inquire into. All that concerned them was that the executors washed their hands of the Baker reversion and left them to get in and deal with it as they thought fit.

In *Strong v. Bird* (4) Jessel M.R. said : " The gift is not perfect until what has been generally called a change of the property at law

(1) 9 Ves. 612.

(2) 19 Ves. 218.

(3) [1904] 1 K. B. 129.

(4) L. R. 18 Eq. 315, 318.

has taken place. . . . It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose ; but if the gift is clear, and there is to be no recall of the gift, and no intention to recall it, . . . there is no reason why the legal instrument should not have its legal effect. For instance, suppose . . . a person made a memorandum on the title deeds of an estate to this effect : ' I give Blackacre to A. B.,' and afterwards conveyed that estate to A. B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor ? The answer would be that there is no resulting trust ; that is rebutted by shewing that the person who conveyed did not intend the person taking the conveyance to be a trustee, and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law, notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. . . . There being the continuing intention to give, and there being a legal act which transferred the ownership . . . the transaction is perfected, and he does not want the aid of a Court of Equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him."

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This passage shows that if a donor makes an incomplete gift of real estate and afterwards, though unintentionally, includes it in a conveyance of real estate to the donee, that conveyance perfects the intended gift, and prevents the donor from reclaiming it on the ground of resulting trust or otherwise.

I agree that the present case goes a little further, as the legal interest in the Baker reversion was got in after the donor's death, not by persons entitled to the equity of redemption therein, but by persons to whom the donor intended to give that equity of redemption. It was got in with the full knowledge of the donor's executors, at all events to the extent that they told the trustees they made no claim and left them to act accordingly. The point is interesting, and if it were necessary to decide it I should hold that the plaintiffs' contention was correct. But, having regard to

ASTBURY J. the view I take that there was sufficient consideration for the letter of directions, it is unnecessary to decide the second point.

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It was also contended that the first point was concluded by Mr. R. J. Parker's opinion. I do not think this was so. The question of consideration was not only not the immediate and direct object of the decision, but it was not properly raised before him, and he did not decide it. The plaintiffs are entitled to the declaration they ask, and the defendants must pay the costs.

Solicitors : *Surman & Co. ; Herbert Z. Deane.*

G. R. A.

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*In re* OPPENHEIM.  
OPPENHEIM v. OPPENHEIM.

[1916 O. 866.]

*Administration—Trustees—Loan of Securities to Treasury—Scheme B—Consideration, whether Income or Capital—Tenant for Life and Reversioner.*

Trustees deposited trust securities with the Treasury by way of loan for a term of years under a scheme of the Treasury, known as Scheme B, which provided that while the securities were on deposit with the Treasury the lenders would receive from the Treasury all interest and dividends paid in respect of them and also, by way of consideration for the loan, a payment at the rate of one-half of 1 per cent. per annum calculated on the face value of the securities ; that at the end of the period of loan the Treasury would either return to the lender the securities or, at their option, pay to him the deposit value (as defined by the scheme) of the securities with an addition of 5 per cent. on that value ; and that the interest and dividends on all deposited securities, together with the additional payment at the rate of one-half of 1 per cent. per annum, would be paid to the holder for the time being on the Treasury Register, and, for convenience of payment, in cases where interest or dividends were payable half-yearly, a full half-year's additional payment (namely,  $\frac{1}{2}$  per cent.) would be added to the first dividend payment, and on the termination of the loan the amount due from the actual date of deposit to the date of return would be calculated, and any overpayment or underpayment would be adjusted. Questions having arisen whether the one-half of 1 per cent. per annum paid as consideration for the loan and the

additional 5 per cent. on the deposit value of the securities at the termination of the loan were capital or income of the trust estate, and how the full half-year's additional  $\frac{1}{4}$  per cent. added to the first dividend payment was to be dealt with on the death of a tenant for life :—

*Held*, that the one-half of 1 per cent. per annum was to be treated as income and the 5 per cent. was to be treated as capital of the trust estate.

*Held*, also, that the trustees ought to deduct from the first full half-year's payment [in advance] of the additional interest at the rate of  $\frac{1}{2}$  per cent. per annum and to retain for the purpose of ultimate adjustment (if necessary) so much of such payment as exceeds the amount of such interest at the rate aforesaid for the period between the date of the deposit and the date at which such first payment may be made.

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#### ADJOURNED SUMMONS.

The plaintiffs were the present trustees of the will of the late M. Oppenheim and had deposited securities representing part of the residuary trust estate of the testator with the Treasury for five years on the terms and conditions of a scheme, known as Scheme B, which, so far as material, provides :—

“(4.) While the securities are on deposit with the Treasury the lender will receive from the Treasury all interest and dividends paid in respect of them and also, by way of consideration for the loan, a payment at the rate of one-half of 1 per cent. per annum, calculated on the face value of the securities.

“NOTE.—The Treasury further announced on August 15th, 1916, that: ‘In the case of securities deposited where the coupons or dividends and also any repayments of capital are payable at the option of the holder in the currency of various countries, the Treasury will make arrangements for the encashments of such interest, dividends or capital repayments in the most favourable manner.’ ”

“(6.) The Treasury will have the right at any time during the currency of the loan to dispose of the securities should they find it necessary to do so, but in the event of their being so disposed of, the lender will continue to receive from the Treasury the same payments as he would have received if the securities had been retained, and at the end of the period of the loan, the Treasury will either return to him securities of the same description and to the same nominal amount as those originally deposited, or, at their option, they will pay to him the deposit value of the securities



NEVILLE J. with an addition of 5 per cent. on that value, plus accrued interest from the last preceding interest date.

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“NOTE.—The Treasury further announced on August 15th, 1916, that: ‘In the event of the Treasury finding it necessary, in the exercise of the right reserved to them by paragraph 6, to sell during the period of deposit any of the deposited securities, and of the average price realised by such sales of any particular security exceeding the deposit value plus 5 per cent., the Treasury will, if the securities are not replaced, be prepared to pay the depositor at the end of the deposit period the full amount of the average price actually realised, notwithstanding that it exceeds the deposit value plus 5 per cent.’

“In the case of securities in respect of which the holder is entitled to repayment at a fixed date or by drawings within a fixed period, the Treasury when making payment will, if the deposit value plus 5 per cent. is less than the redemption value, make a further addition of an amount equal to the enhancement in value due to the approach of the date of redemption while the securities have been on deposit.

“For the purposes of this paragraph ‘deposit value’ means in the case of sterling securities the net mean quotation (i.e. the quoted price less accrued interest or dividend in cases in which such accrued interest or dividend is included in the quoted price) on the London Stock Exchange of the day preceding the publication of the notice including the securities in the Treasury List for deposit under Scheme B, and in the case of dollar securities the sterling equivalent at the exchange of the day of the net quotation of the New York Stock Exchange of that day. In the case of unquoted securities or quoted securities in respect of which the current quotation may not be regarded as representing the true market value, the prices will be fixed by the Treasury . . . .”

“(10.) The interest and dividends on all deposited securities, together with the additional payment at the rate of one-half of 1 per cent. per annum, will be paid to the holder for the time being on the Treasury Register, by warrant, as soon as they have been received by the Treasury. Non-sterling dividends will be paid in sterling at the exchange of the day on which the Treasury books are closed for the purpose of preparing the warrants. For con-

venience of payment, in cases where interest or dividends are payable half-yearly, a full half-year's additional payment (viz.,  $\frac{1}{4}$  per cent.) will be added to the first dividend payment, and on the termination of the loan, the amount due from the actual date of deposit to the date of return will be calculated, and any overpayment or underpayment will be adjusted when the return is effected. A similar procedure, mutatis mutandis, will be applied in cases of quarterly or other periodical payments of interest or dividends.

"(11.) Under section 2 of the Government War Obligations Act, 1915 (5 & 6 Geo. 5, c. 96), and section 68 of the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), trustees and companies are enabled to take advantage of the scheme notwithstanding any provisions of their trust or constitution, and are not liable for any loss arising from so doing."

Under this scheme trust securities were largely deposited with the Treasury, and in many instances the question arose whether the bonus of  $\frac{1}{2}$  per cent. and 5 per cent. respectively payable under paragraphs 4 and 6 was to be treated as capital or income of the trust estate, and as to how, in the event of the  $\frac{1}{2}$  per cent. bonus being income, trustees were to adjust the additional  $\frac{1}{4}$  per cent. payable in advance on the first dividend payment; and the plaintiffs, by arrangement with the Treasury and as a test case, issued this summons to determine the matter.

*Owen Thompson*, for the plaintiffs, stated the facts and that the notes to paragraphs 4 and 6 were explanatory and not part of the scheme.

*Dighton Pollock*, for parties beneficially interested in the capital of the testator's residuary trust estate. The object of the scheme is a loan by the inheritance to the Treasury, and the  $\frac{1}{2}$  per cent. payable to the trustees on the face value of the securities under paragraph 4 is the "consideration for the loan." It is in the nature of an accidental and temporary profit or bonus arising from the shares and must be treated as capital. There is no authority directly in point, but it is submitted that the principle of *In re Armitage* (1), *In re Searancke* (2), and *In re Bladon* (3) applies.

(1) [1893] 3 Ch. 337.

(2) (1896) 74 L. T. 339.

(3) [1912] 1 Ch. 45.

NEVILLE J. When the Legislature intends an allowance of this nature to be  
 1916 treated as income it says so clearly; the National Debt (Conver-  
 OPPENHEIM, sion) Act, 1888 (51 & 52 Vict. c. 2), s. 10, provides for a commission  
*In re.* of 5s. per cent. to facilitate the conversion of funds, and directs  
 OPPENHEIM (sub-s. 2) that the payment is to be treated as income. There is  
*v.* nothing of the kind here. The same observations apply to the  
 OPPENHEIM. 5 per cent. payable to the trustees under paragraph 6 on the deposit  
 value of the securities.

*Austen-Cartmell*, for parties interested in the income of the residuary trust estate of the testator. My point is that the  $\frac{1}{2}$  per cent. in paragraph 4 is income and the 5 per cent. in paragraph 6 is capital.

[He was stopped.]

NEVILLE J. Under the scheme, which was an offer on the part of the Government to take foreign securities of a particular character, there are what one may call two bonuses provided for. One is a bonus by way of annual payment of  $\frac{1}{2}$  per cent. in addition to the dividends on the stocks deposited with the Government; the other is a bonus of 5 per cent. on repayment of the capital. It is said that both the  $\frac{1}{2}$  per cent. and the 5 per cent. were really considerations for the loan, and are therefore to be treated as an increment to capital and not an increment to income. That is the point I have to decide.

That the  $\frac{1}{2}$  per cent. is a payment, and intended to be a payment, by way of income is, I think, perfectly clear from clause 10 of the scheme. But then it is said, "Oh, that may be so, and yet the trustees may have a duty imposed on them of converting this part of the income which they receive in respect of these securities into capital, inasmuch as it is a bargain between the trustees and the State, and the tenant for life has no right to take advantage of anything that is paid in consideration for the bargain." It seems to me like a case where, a trustee having a power to invest in certain securities, the State interposed and gave him power to invest in a Government security, that security paying interest ascertained in a particular way and a 5 per cent. bonus on the capital on repayment. If this had been an existing security at the date when the testator made his will, and if he had

authorized the trustees to lend in accordance with the terms of the Scheme B, could it then have been said that the  $\frac{1}{2}$  per cent. paid annually in addition to the dividends received upon the stock was a capital payment and not a payment on account of income? I cannot think that there is anything either in the general law or in the scheme itself which can make it either compulsory or admissible on the part of trustees to capitalize the annual payment which is made in respect of such securities. It seems to me the reasonable interpretation of this scheme is that the trustees, being authorized by law to accept the terms offered to them by the State, can accept them in full, and can accept the  $\frac{1}{2}$  per cent. as income which they hold for the benefit of their cestuis que trust. With regard to the 5 per cent. bonus, I think it is clear that it is capital.

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*Owen Thompson.* There remains the question raised under paragraph 10 as to the additional  $\frac{1}{4}$  per cent. bonus added to the first dividend payment.

[NEVILLE J. The only difficulty is in the cases where the cestui que trust receives the dividend directly. I do not see that it can be surmounted except in this way—either by the trustees revoking the authority to pay these dividends to the tenant for life, or getting from the tenant for life an undertaking that any surplus will be repaid. But I have no power to say to the trustees “You will be free from liability in case you get an undertaking from the tenant for life to repay,” because, if the tenant for life is insolvent, I do not see how I can exonerate the trustees from liability.]

*Austen-Cartmell.* This is a test case brought to obtain, if possible, a general decision on the point in order to assist trustees and bankers and others. It might be suggested on the construction of paragraph 10, so far as the tenant for life is concerned, that he takes the bonus when it is payable for better or for worse, and is not affected by the provision that there may subsequently have to be an adjustment.

[NEVILLE J. In that case the tenant for life would get more than he is entitled to, and the trustees would have to make good to the estate the amount of the overpayment. I can only administer the law as I find it, and trustees are not entitled to enter into



NEVILLE J. bargains with their cestuis que trust and let them take part of the estate on that footing. Of course, if they recover it, well and good ; but if they do not, they are responsible.]

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That would appear to be so. Suppose securities are deposited on May 1 the dividends in respect of which are payable on June 1. Then on June 1, although the securities have only been deposited for one month, the Government would pay over the interest and dividends received on June 1 plus an additional full six months' interest at the rate of  $\frac{1}{2}$  per cent. per annum, that is,  $\frac{1}{4}$  per cent. for the-half-year. In that case, if the tenant for life gets the whole of it, he is for the moment overpaid to the extent of five-sixths of the  $\frac{1}{4}$  per cent. interest, and there might have to be an adjustment unless the overpayment is worked off.

[NEVILLE J. If as a matter of fact he dies exactly when five-sixths of  $\frac{1}{4}$  per cent. is due to him, there would be no adjustment ; it would be exactly right. But if at the time of death there are only four-sixths of the  $\frac{1}{4}$  per cent. due, then there is one-sixth of the  $\frac{1}{4}$  per cent. adjustment required, because he is overpaid to the extent of five-sixths and is only entitled to four-sixths and has to pay back one-sixth.]

Yes. We must consider, therefore, what takes place upon the repayment of the loan.

[NEVILLE J. To the department death does not matter. In fact I ought to have spoken of A. B. and not of the tenant for life. Suppose A. B. makes a deposit and gets five-sixths of the  $\frac{1}{4}$  per cent., and subsequently the loan is paid off when exactly that proportion of the  $\frac{1}{4}$  per cent. has accrued, there is no adjustment, but if upon the repayment of the loan there is only four-sixths of the  $\frac{1}{4}$  per cent. due to him, then there is one-sixth for which he has to account, and it is deducted from the capital payment, the 5 per cent. payment.]

Yes ; it depends upon whether the depositors have in effect made up the overpayment with which they started, and if they have not they have to make an allowance to the State.

[NEVILLE J. That is so. They have to make the adjustment out of any cash that passes between the Government and the depositors.]

So really it would not be deducted from any particular payment

of income. It would be deducted from the total amount handed over by the department to the depositor, and if any adjustment between the tenant for life and the remainderman was necessary, that would have to be done apart from any interference of the department.

[NEVILLE J. Quite so.]

The result would be that, if it were a tenant for life who had had the benefit of the overpayment, the State would still get its rights. It would adjust the matter between itself and the depositors (i.e., the trustees), but would have nothing to do with any claim by the depositors against the tenant for life. If the loan is repaid when as between the depositors and the State there has been no overpayment, it does not of course matter, at any rate if the tenant for life is still living, but if upon the repayment it was found there had been an overpayment of the  $\frac{1}{2}$  per cent., there would, even if the tenant for life were still living, have to be an adjustment in the estate itself. The department would not take that into consideration at all. It would simply pay off the deposit, and then there would have to be a further adjustment between the tenant for life and the trustees. Similarly, if the tenant for life dies at a date when less than the amount of the initial payment was due to him, there would again have to be an adjustment between him and the remainderman. It would seem, therefore, that the trustees ought to receive the first instalment of the  $\frac{1}{2}$  per cent. bonus and hold it up to meet any adjustment which may subsequently become necessary between the tenant for life and the estate; and to this extent they would have to revoke any authority to pay direct to the tenant for life.

[NEVILLE J. That would be so. It would require revocation of the authority until the trustees have got in their hands the maximum in respect of which there may hereafter have to be an adjustment. They would know the extent of the liability by the extent of the overpayment. Suppose it is the security of a foreign Government, then as soon as the deposit takes place the foreign Government have to pay the income to our Government, because the deposit, ipso facto, revokes any direction to them to pay direct to the tenant for life. That would make it unsafe for trustees to sign a fresh authority until they have received the first dividend. Therefore

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NEVILLE J. all they have to see to is that the tenant for life is in a position to  
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 OPPENHEIM, to recoup the estate any overpayment which may ultimately be found  
*In re.* to have been made to him, and that means the deduction from the  
 OPPENHEIM first payment of the  $\frac{1}{2}$  per cent. bonus of so much as will cover the  
*v.* maximum of the possible overpayment. Then the estate is safe,  
 OPPENHEIM. because it never can be more, and it may be less, or it may be  
 nothing. I think then it really comes to this, that trustees are  
 not entitled to pay over the first instalment of the bonus to the  
 tenant for life without deducting such proportion thereof as may,  
 regard being had to the date of payment, ultimately turn out to  
 have been overpaid to the tenant for life. In the case which has  
 been put there would be five-sixths of  $\frac{1}{4}$  per cent. so overpaid,  
 and that is what would have to be retained.]

NOTE.—The order as passed and entered, after declarations dealing with the payments to be made under paragraph 4 of the scheme at the rate of  $\frac{1}{2}$  per cent. per annum calculated on the face value of the securities and with the payments to be made under paragraph 6 of the scheme of the addition of 5 per cent. on the deposit value (as defined by the scheme) of the said securities, proceeded:—"And this Court doth declare that the plaintiffs as trustees of, &c., ought in the case of each of the said securities so deposited as aforesaid to deduct from the amount of the first payment which will or may be made by the said Lords Commissioners under paragraph 4 of the said scheme in respect of the said one-half of 1 per cent. per annum and to retain for the purpose of ultimate adjustment (if the same shall become necessary) under the provisions of paragraph 10 of the said scheme the excess (if any) of the amount of such first payment over and above the amount of interest at the rate of one-half of 1 per cent. per annum upon the face value of the security for the period between the date of the deposit and the date at which such first payment may be made."

Solicitors for all parties : *Norton, Rose, Barrington & Co.*

H. L. F.

*In re* HAYMAN, CHRISTY & LILLY, LIMITED.

CHRISTY *v.* THE COMPANY.

[1916 H. 886.]

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*Company—Insolvent Company—Debentures issued within Three Months of Winding up—Debentures to secure Past and Future Advances—Fresh Advance repaid before Winding up—Measure of Validity—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212.*

Within three months of winding up, an insolvent company issued debentures to their bank to secure their loan and current accounts. The loan account, on which a considerable sum was owing, was left untouched, but the bank subsequently advanced more than the value of the debentures on the current account. At the time of the winding up, however, there was nothing due on current account, the advance having been discharged by payments to that account in the ordinary course of business :—

*Held*, that under s. 212 of the Companies (Consolidation) Act, 1908, the debentures so far as issued as security for the past debt on the loan account were invalid, and so far as issued as security for the fresh advance on the current account they were only valid to the extent of the money owing on that account at the date of the winding up, and, this being nil, they were wholly invalid.

#### SUMMONS TO VARY MASTER'S CERTIFICATE.

In 1914 and 1915 the above company's bank advanced them altogether 3000*l.* on a loan account. The loan, which was repayable on demand, was secured by the deposit of various securities, including twelve first mortgage debentures of 100*l.* each issued by the company. Each of the three directors also gave the bank a promissory note for 350*l.* payable on March 27, 1916.

On December 31, 1915, with the bank's consent, some of the securities were sold for 392*l.*, which was carried to the company's current account.

About the end of March, 1916, when the promissory notes were due, the bank pressed for payment. The whole position was reviewed, and it was arranged that the company should issue four second mortgage debentures of 100*l.* each to the bank as further security for the loan account and current account, in consideration of which the bank would continue the accounts.



ASTBURY J. On the faith of this arrangement the bank continued to honour the company's cheques. On March 31, 1916, there was a credit balance of 108*l.* on the current account, but by April 29, when the debentures were issued, the debit balance, after crediting cheques paid in and actually cleared, was 404*l.*, and on May 6 it was 447*l.* On May 12, however, when the current account was closed, there was a credit balance of 24*l.*, which would be reduced to 13*l.* by bank interest and charges. As against this, 3000*l.* with interest was still due on the loan account, the total amount owing to the bank on the two accounts being 3006*l.*

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On May 12, 1916, the plaintiff obtained the usual judgment for accounts and inquiries in a debenture-holders' action, whereupon the bank closed the current account.

On May 23, 1916, the company was wound up by an extraordinary resolution. It was admittedly insolvent at the end of March.

The accounts in the debenture-holders' action proceeded, and on November 1, 1916, the Master certified that 1269*l.* was due to the bank for principal and interest on the twelve first mortgage debentures and 408*l.* for principal and interest on the four second mortgage debentures.

On November 9, 1916, the liquidators issued this summons to vary the certificate by disallowing the 408*l.* on the ground that, as the advances on the current account had been paid off, the four second mortgage debentures were wholly invalid under s. 212 of the Companies (Consolidation) Act, 1908.

*W. M. Hunt*, for the liquidators. Sect. 212 provides that where a company is being wound up a floating charge created within three months of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, "except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum."

The four debentures were clearly within the section. As securities for the past debt on the loan account they were invalid. They were only valid to the amount of the overdraft from time to time subsequently allowed on the current account. But at the date of the

liquidation there was no overdraft. The debentures are therefore wholly invalid.

There is no exact authority on the point, but the object of the section is to prevent moribund companies from creating floating charges for past debts or for moneys which do not go to swell their assets: *In re Orleans Motor Co.* (1)

*J. W. Manning*, for the bank. The exception in s. 212 is not confined to cash paid "and remaining due at the date of the liquidation." Over 400*l.* was in reality advanced on the faith of these debentures, and that is the measure of their validity. The mere fact that the advance was repaid in the working of the current account does not affect this measure. The debentures, which were issued as security for both accounts, are therefore valid to the full amount.

*Owen Thompson*, for the plaintiff.

ASTBURY J., after stating the facts. The Master has certified that the four debentures are a valid security for their full amount. The liquidators seek to vary this finding and contend that the debentures so far as issued as security for the past debt on the loan account were invalid under s. 212, and so far as issued as security for the current account they can only be held as valid securities for the amount due on that current account at the date of the winding up, which was in fact nil. This point on s. 212 has not been decided in any reported case.

In *In re Orleans Motor Co.* (1) Parker J. said: "The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors."

In the present case the transaction was perfectly bona fide, and if the bank had proceeded in a different way they might have obtained valid securities. But they in fact took these debentures as securities for the old debt plus an agreement to continue the current account.

I think the expression "except to the amount of any cash paid to the company" means "except to the amount of any cash absolutely and unconditionally paid to the company." Debentures

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ASTBURY J. issued within three months of a winding up in consideration of a loan, of the amount for which they were issued, repayable in a week, would obviously be invalid after the repayment of the loan—the payment would amount to redemption. Where debentures are issued and paid for in the ordinary way no question can arise. But where they are issued as security for future advances I think the section must be read “except to such amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge as may be owing at the date of the winding up,” with 5 per cent. interest on that amount.

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It is clear that debentures issued for a past debt are invalid under s. 212 if the company is insolvent and is wound up within three months. Where they are bona fide issued partly for a past debt and partly for a fresh advance on current account I think that so far as issued for the past debt they are invalid, and so far as issued for the fresh advance on current account they are only valid to the extent of the money actually owing on that account at the date of the winding up.

In the present case no money was owing at the date of winding up on the fresh advance which had been paid off in the working of the current account. The four debentures are therefore wholly invalid, and the certificate must be varied accordingly.

Solicitors: *Ward, Perks & Terry; Snell & Co.; Lambert & Hale.*

G. R. A.

- *In re* BERESFORD-HOPE.  
ALDENHAM *v.* BERESFORD-HOPE.

[1916 B. 2074.]

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*Heirlooms — Settlement — Real Estate — Will — Construction — Trusts of Chattels as Heirlooms — “To go and be held” with Settled Realty — “Upon such trusts as will best correspond with the uses, trusts, and powers” of Settled Realty — Executory Trust — Form of Settlement.*

By his will a testator bequeathed to trustees certain chattels upon trust “to permit the same to go and be held,” so far as the rules of law and equity would admit, with the B. estate, devised by the will of his mother, as heirlooms, for the person, or persons, who, under the trusts of the same will concerning that estate, should for the time being be entitled thereto, and so that none of the articles should, for the purpose of transmission, vest absolutely in any person who might become tenant in tail male by purchase of the B. estate and should not attain twenty-one.

By a second gift the testator bequeathed to the same trustees certain other chattels commonly used with the mansion-house at B. “upon such trusts, and subject to such powers as, having regard to the nature thereof, and so far as the rules of law and equity will permit, will best correspond with the uses, trusts, and powers” declared and contained of the B. estate, yet so that none of the same chattels should, for the purpose of transmission, vest absolutely in any tenant in tail by purchase of the same estate who should not attain twenty-one.

Under the will of the testator’s mother the B. estate was settled, in the events which had happened, upon the testator for life, with remainder to his son P. B. B.-Hope (born in the lifetime of the testator’s mother) for his life, with remainder to the use of the first and every other son of P. B. B.-Hope (of whom there were none), with remainder to the use of the first and other sons of the testator born after the death of his mother, in tail male, with remainders over. The testator died in 1887, when P. B. B.-Hope became tenant for life of the B. estate and entitled to a life interest in the heirlooms. In 1899 the B. estate was sold, and also certain of the heirlooms in the second gift, and the proceeds invested. C. T. B.-Hope, another son of the testator, born in 1855, became entitled under the settlement to an estate in tail male by purchase of the B. estate expectant on the death of P. B. B.-Hope without issue male. C. T. B.-Hope attained twenty-one in 1876, but died in 1906, before his estate came into possession, and without having disentailed the proceeds. By his will he left everything he possessed to his wife, the second defendant, and appointed her executrix. The first defendant, H. T. B.-Hope, was



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his only son. In May, 1916, P. B. B.-Hope died without issue male, and H. T. B.-Hope became tenant in tail in possession of the estate, and disentailed the proceeds of sale.

Upon an originating summons by the trustees of the testator's will to have it determined to whom the heirlooms went:—

*Held*, (1.) that the chattels comprised in the first gift came within the general principle established by *Foley v. Burnell* (1783) 1 Bro. C. C. 274, 285; (1785) 4 Bro. P. C. 319, and vested absolutely in the late C. T. B.-Hope as tenant in tail male by purchase who had attained twenty-one, and now belonged to his widow and legal personal representative.

*In re Lord Chesham's Settlement* [1909] 2 Ch. 329 distinguished.

But *held*, (2.) that by the gift of the second set of chattels the testator had created an executory trust which must be executed by the Court. The form of the settlement would be as in *Prideaux's* *Precedents*, 21st ed. vol. ii. p. 971, and as that would exclude any claim on behalf of the estate of C. T. B.-Hope, these chattels, or their proceeds, would devolve on his son, H. T. B.-Hope.

*Shelley v. Shelley* (1868) L. R. 6 Eq. 540, and *Miles v. Harford* (1879) 12 Ch. D. 691 followed.

#### ADJOURNED SUMMONS.

The plaintiffs, the Right Honourable Alban George Henry, Baron Aldenham, and the Right Honourable James William Lowther, were the present trustees of the will of the Right Honourable Alexander James Beresford Beresford-Hope, of Bedgebury Park, Kent, the testator in the action. The first defendant, Harold Thomas Beresford-Hope, was the son of the second defendant, Julia Margaret Beresford-Hope, and she was the widow of Charles Thomas Beresford-Hope, the twelfth child of the testator.

The testator at the time of his death was tenant for life of the Bedgebury settled estate, in the county of Kent, under the terms of the will and second codicil of his mother, Louisa, Viscountess Beresford, made in 1851, with remainder, in the events which happened, to Philip Beresford Beresford-Hope, the eighth child of the testator (who was born in the lifetime of the Viscountess), with remainder to the use of the first and every other son of P. B. Beresford-Hope (of whom there were none), with remainder to the use of the first and every other son of the testator, to be born after the decease of the Viscountess, successively, according to seniority, in tail male, with remainders over.

Viscountess Beresford died on July 21, 1851, and on the death

of her husband, Viscount Beresford, on January 8, 1854, the testator became tenant for life of the Bedgebury estate.

By his will dated April 22, 1880, the testator appointed his wife (who predeceased him) and the Marquis of Salisbury and the plaintiff, Baron Aldenham, executors, and bequeathed to them a portrait of Marshal Beresford by Sir Thomas Lawrence, and certain jewels and other articles of virtu therein enumerated, together with furniture, pictures, ornaments, and books used in the domestic chapel at Bedgebury, to hold the same unto his said executors "in trust to permit the same to go and be held, as far as the rules of law and equity will admit, with the said Bedgebury estate devised by the last will, dated April 14, 1851, of my said mother, as heir-looms, for the benefit of the person or persons who, under the limitations or trusts in the same will (including a codicil thereto dated April 16, 1851) contained of and concerning that estate, shall, for the time being, be entitled thereto . . . and so that none of the said articles or things shall, for the purpose of transmission, vest absolutely in any person or persons who by virtue of the limitations or trusts aforesaid may become tenant, or tenants in tail male, or in tail by purchase of the said Bedgebury estate, and shall not respectively attain the age of twenty-one years." These articles are referred to as the "first gift."

The said will contained a "second gift," being a further bequest to his executors of jewels, bronzes, marbles, and other articles of virtu at or belonging to or commonly used with the mansion-house at Bedgebury Park aforesaid, and all pictures, household goods, furniture and effects of every description, and also all plate bearing Marshal Beresford's arms, upon trust to permit his wife to have the use and enjoyment thereof for her life, and immediately after her decease upon such trusts and purposes as she should by will or codicil appoint, and in default of any such appointment should remain and be "upon such trusts and subject to such powers as, having regard to the nature thereof, and so far as the rules of law and equity will permit, will best correspond with the uses and trusts and powers by and in the said will and codicil thereto of my said mother limited, declared, and contained of and concerning the said Bedgebury estate, yet so nevertheless that none of the same chattels shall, for the purpose of transmission, vest absolutely in any tenant

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EVE J.      in tail by purchase of the same estate who shall not attain the age of  
 1916      twenty-one years.”  
 ~~~~~  
 BERESFORD- The wife of the testator died in his lifetime on March 18, 1881.
 HOPE, The testator died on October 20, 1887, when Philip B. Beresford-
In re. Hope became tenant for life of the Bedgebury estate, and also
 ALDENHAM entitled to a life interest in the heirlooms and chattels settled by the
 v. will of the testator.
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 —

In 1899 the Bedgebury estate was sold under the provisions of the Settled Land Acts, and in the same year, with the consent of the Court, certain of the chattels comprised in the second gift (together with a few articles of trifling value included in the first gift) were sold by P. B. Beresford-Hope and the proceeds invested. The chattels remaining unsold were of considerable value both intrinsically and by reason of their historical associations.

On May 12, 1916, P. B. Beresford-Hope died, without ever having had any male issue.

Charles Thomas Beresford-Hope, the twelfth child of the testator, was born on November 3, 1855, and became entitled under the second codicil of his grandmother's will to an estate in tail male by purchase in the Bedgebury estate in remainder expectant on the death of P. B. Beresford-Hope without issue male.

By his will dated September 24, 1880, Charles Thomas Beresford-Hope gave, devised, appointed, and bequeathed all the property of every description whatever of or to which he might be possessed or entitled unto and to the use of his wife, the defendant Julia Margaret Beresford-Hope, absolutely, and he appointed his wife and Baron Aldenham executors of his will. The will was proved by his widow alone.

Charles Thomas Beresford-Hope had attained twenty-one in 1876, and died on July 21, 1906, without having executed any disentailing assurance. He left two daughters and a son, the first defendant Harold Thomas Beresford-Hope, who was born on June 13, 1882, and had now become tenant in tail in possession by descent of the proceeds of sale of the Bedgebury estate which he disentailed.

Questions having been raised as to the title to the two sets of heirlooms, the plaintiffs took out an originating summons on July 31, 1916, to have it determined, first, whether, according to the true

construction of the will and in the events which had happened, the chattels bequeathed by the first gift now belonged to the defendant Harold Thomas Beresford-Hope, being the person who under the trusts became entitled in possession as tenant in tail male by descent to the said estate (or the proceeds of the sale thereof) on the determination of the life estate therein of P. B. Beresford-Hope, or to the defendant Julia Margaret Beresford-Hope as executrix and universal legatee of C. T. Beresford-Hope, being the person who under the trusts became entitled in remainder as tenant in tail male by purchase to the said estate expectant on the determination of the said life estate and attained the age of twenty-one years.

A second question was asked as to the second gift of chattels, whether they, or the proceeds of such of them as had been sold, now belonged to the first defendant or to the second defendant.

The questions on the two gifts were argued separately.

H. B. Vaisey, for the trustees of the will. The question, put shortly, is whether in each case, under the construction of the particular gift, the heirlooms vested absolutely in the tenant in tail by purchase who attained twenty-one, but who predeceased the tenant for life and so never came into actual possession of the estate, or whether, on the other hand, on the death of the tenant for life, they vested in the tenant in tail by descent, who, under the limitations, succeeded next in possession to the real estate.

Maugham, K.C., and *Whinney*, for the first defendant. As to the first gift of heirlooms, we submit that the matter is settled by the authority of *In re Lord Chesham's Settlement*. (1) That case was an exception to the general principle laid down in *Foley v. Burnell*. (2) In *In re Lord Chesham's Settlement* (1) certain chattels were assigned to trustees upon trust, so far as the rules of law and equity would allow, "to permit the same to be used, held, and enjoyed with the mansion-house called Latimer" by the person or persons who for the time being should be entitled to the said mansion-house under the limitations therein contained, but so that, for the effect of transmission, they should not vest absolutely in any person thereby made tenant in tail male or in

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(2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

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tail by purchase who should not attain twenty-one. The Court of Appeal adopted the construction put upon this same clause by Chitty J. in *In re Lord Chesham* (1) and came to the conclusion that there were sufficient indications of intention in that will on the part of the settlor that the heirlooms were to be enjoyed with the mansion-house and should vest only in a tenant in tail in possession. In the present case there is a difference in the words used, as the heirlooms are "to go and be held with the Bedgebury estate," while in the other they were "to be used, held, and enjoyed with the mansion-house called Latimer." But that cannot be any real distinction. Enjoyment with an estate is practically the same thing as enjoyment with a house in the middle of the estate. You do not enjoy heirlooms in the open air, but in connection with the house on the estate, and there was such a house here. We admit that the general principle as enunciated in *Foley v. Burnell* (2) is against us, but this case is another exception to it, like *In re Lord Chesham's Settlement*. (3) That case has, no doubt, been adversely criticized, and it is discussed in a long note in Jarman on Wills, 6th ed. vol. i. pp. 697, 698. In *In re Parker* (4) Parker J. stated the rule in *Foley v. Burnell* (2) which must be applied unless a contrary intention was to be gathered from the words of the will. He could not gather that intention from the words in the will before him, and he distinguished *In re Lord Chesham's Settlement*. (3) The words in the present case, it is submitted, point to actual possession being a necessary qualification for a complete interest under the clause in this will, and it is indistinguishable from *In re Lord Chesham's Settlement*. (3) The decision, therefore, on the first gift of chattels should be in favour of the first defendant.

Clayton, K.C., and *Fairfax Luxmoore*, for the second defendant. As to the first gift, the contention of the first defendant would be untenable but for *In re Lord Chesham's Settlement*. (3) But the ratio decidendi of that case shows that the first defendant is not entitled to succeed. In that case there were clear words giving the use and enjoyment of the chattels with "the mansion-house called Latimer" (and as chattels attached thereto) and not with the estate; and it was held that the words imported possession and showed a

(1) (1886) 31 Ch. D. 466.

(3) [1909] 2 Ch. 329.

(2) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

(4) [1910] 1 Ch. 581.

clear intention that, so far as the perpetuity rule would permit, only some one entitled in possession to the real estate was to have the use and enjoyment of these heirlooms. But here the words are different; there is no necessity for the heirlooms to be bound up with the house. The words are "to go and be held with the Bedgebury estate." The Master of the Rolls stated and treated as established the principle laid down in *Foley v. Burnell* (1), but went on to say that the question was whether there was sufficient in the language of the instrument before him to satisfy the Court that it was not intended that any person should take unless he became actually tenant in tail in possession. Farwell L.J. took the general rule to be as laid down in *Lord Scarsdale v. Curzon* (2), and quoted the fourth rule that doubtful words would not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty was obtained. Here there is not sufficient to overrule the general canons of construction.

Maugham, K.C., in reply on the case of *Lord Scarsdale v. Curzon*. (2)

On the second gift :

Maugham, K.C., and *Whinney*, for the first defendant. The question here is what is the effect of the words "upon such trusts as will best correspond with the uses and trusts and powers . . . limited, declared, and contained of and concerning the said Bedgebury estate." The words are quite different from those of the first gift. It is an executory limitation; the first gift was an executed trust. Here there is no difficulty in keeping the chattels and the estate together until the tenant in tail disentails. The form which is now adopted in settling heirlooms with real estates is substantially the same in all the leading books of precedents: *Prideaux's Precedents on Conveyancing*, 21st ed. vol. ii. p. 971; *Key and Elphinstone's Precedents*, 10th ed. vol. ii. p. 783 (where there is an assignment of leaseholds for years or lives upon trusts corresponding with the uses of freeholds); *Bythewood and Jarman's Conveyancing* (1915 ed.), vol. ii. p. 438. In these forms there are three incidents stated which cut down the estate which is *prima facie* given, the third being dying under twenty-one without having become

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319. (2) (1860) 1 J. & H. 40, 51.

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EVE J. absolute owner. These clauses have received the universal acceptance of conveyancers, and carry out the testator's direction here
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 BERESFORD. and provide trusts which best correspond with the uses, trusts, and
 HOPE, powers concerning the Bedgebury estate. There is no modern case
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 BERESFORD. *Shelley v. Shelley* (1) was a similar case where there was an executory
 HOPE. trust of jewels, and the Court made a settlement depriving the son, who attained twenty-one but died in the lifetime of the preceding taker, of the power to dispose of the property. The Court, therefore, has to construe the gift in this will as if the form used in these precedents were imported into it, and, so construing it, the heirlooms will devolve upon the first defendant. Similar words were construed in the case of *Sackville-West v. Viscount Holmesdale* (2), which throws some light upon the proper meaning of "correspond." The Court has to mould the trust so as, if possible, to make these chattels vest in it.

Clayton, K.C., and *Fairfax Luxmoore*, for the second defendant. This is not an executory trust, and if it were it could not be so framed as to deprive the second defendant of the right to these chattels. The trust here is declared in terms, and is stated in the will itself; there is nothing more to be done. The heirlooms were to remain and be upon the trusts thereafter declared. Before the words of this particular trust in the will there is a trust for the wife of the testator for life, which is clearly an executed trust, then a trust for her appointees, and then, in default of appointment, it goes upon the trusts there set out. These trusts are declared and executed and not left to be settled by other persons. Nor is there any direction that the trustees are to convey or settle as in the case of an ordinary executory trust. As Lord Westbury has said, "It is of the essence of an executory trust that it should not be fully expressed or declared in the instrument creating it": *Sackville-West v. Viscount Holmesdale*. (3) The present trust is not like that in *Shelley v. Shelley*. (1) In *Miles v. Harford* (4) there was no direction to convey or settle, and it differs from the present case.

Maugham, K.C., in reply. *Miles v. Harford* (4) was a case of an executory trust like the present and almost totidem

(1) L. R. 6 Eq. 540.

(3) L. R. 4 H. L. 566.

(2) (1870) L. R. 4 H. L. 543, 557.

(4) 12 Ch. D. 691.

verbis. It is conclusive that this is an executory trust and nothing else.

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Dec. 21. EVE J. delivered the following written judgment :—
The plaintiffs are the trustees of the heirlooms settled by the will of the above-named Alexander James Beresford Beresford-Hope. He was tenant for life of an estate known as the Bedgebury estate settled by the will of his mother, Viscountess Beresford, and his wish and intention was to settle the heirlooms in the same way, as far as practicable, as the realty was settled. The first defendant, Harold Thomas Beresford-Hope, on the death of his uncle, Philip Beresford Beresford-Hope, in May, 1916, became entitled as tenant in tail in possession by descent to the proceeds of sale of the Bedgebury estate, and these proceeds he has since disentailed. The other defendant, Julia Margaret Beresford-Hope, is the widow and legal personal representative of Charles Thomas Beresford-Hope, the father of the first defendant, who was entitled to an estate in tail male by purchase in the said estate expectant on the death of Philip Beresford Beresford-Hope, but who died in 1906 and before his estate fell into possession. He attained twenty-one in 1876, but never executed any disentailing assurance.

The questions I have to determine relate to the destination, as between the two defendants, of two sets of settled heirlooms. Did they, or did either of them, vest indefeasibly in the late Charles Thomas Beresford-Hope on his attaining twenty-one, notwithstanding he never lived to enjoy actual possession of the settled estate, in which case his widow, as his legal personal representative, is now entitled to them, or do they, or either of them, belong to the first defendant as absolute owner of the proceeds of sale of the settled estate ?

The first set of heirlooms, consisting of furniture, pictures, books, ornaments, and jewels, was bequeathed to trustees "in trust to permit the same to go and be held, so far as the rules of law and equity will admit, with the said Bedgebury estate, as heirlooms, for the benefit of the person or persons who under the limitations of that estate shall for the time being be entitled thereto, and so that none of the said articles or things shall, for the purpose of transmission,

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vest absolutely in any person or persons who by virtue of the limitations or trusts aforesaid may become tenant or tenants in tail male, or in tail by purchase, of the said Bedgebury estate, and who shall not respectively attain the age of twenty-one years." The answer to the question whether, under these limitations, the late Charles Thomas Beresford-Hope acquired a transmissible interest in these heirlooms on attaining twenty-one depends upon whether the language I have just read is sufficient to satisfy the Court that it was not intended that any person should take unless he became tenant in tail in possession of the settled estate. Unless the Court is so satisfied the true principle to be applied is that, "as you cannot strictly entail personal property, chattels which are given by reference to limitations in strict settlement of real estate vest absolutely in the first tenant in tail in esse." In the case from which this citation is made (*In re Lord Chesham's Settlement* (1)) the Court of Appeal, adopting a view expressed by the late Chitty J. when the settlement was before him for another purpose (2), came to the conclusion that there were to be found in the settlement of the chattels clear words referring to actual possession and indicating that no one should be entitled to claim the use and enjoyment of the chattels except in conjunction with the mansion-house, and only if and when he became entitled to the possession of that mansion-house. That this conclusion was necessary before the case could properly be held to be an exception to the general principle I have stated is clear from the fourth rule established by *Foley v. Burnell* (3) and enunciated in *Lord Scarsdale v. Curzon* (4): "Doubtful words, tending to restrict the interest in the chattels to those who come into possession of the real estate, will not overrule the operation of the general canons of construction, or have the effect of suspending the interest until the time when possession of the realty is obtained." To the same effect is the following extract from Parker J.'s judgment in *In re Parker* (5): "It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a

(1) [1909] 2 Ch. 329, 333.

P. C. 319.

(2) 31 Ch. D. 466.

(4) 1 J. & H. 40, 51.

(3) 1 Bro. C. C. 274; 4 Bro.

(5) [1910] 1 Ch. 584.

vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty, and, if such estate is in remainder, subject to all prior limited interests such as interests for life. This rule is thought to give effect, and does, in my opinion, give effect, to the testator's expressed intention as nearly as the nature of the property admits, it being impossible wholly to effectuate such intention, because the law does not allow the creation of estates or heritable interests in personal property, and has rules against perpetuities. A settlor may, of course, use words shewing an intention to modify the rule, but the words relied on for this purpose must indicate such intention with reasonable certainty. Thus it is possible to introduce a provision defeating the interest of a tenant in tail by purchase who dies under the age of twenty-one years, but such a provision will not be implied merely by a direction that the real estate and chattels shall go together as long as the rules of law and equity permit. There must be an express provision to that effect. Similarly it is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain." The question, therefore, is purely one of construction, and so treating it, I think it is impossible to extract from the bequest I have here to deal with any indication of any intention to do more than settle the chattels with the real estate as nearly as the nature of the property admits, with an express provision defeating the interest of a tenant in tail by purchase who dies under twenty-one. Nothing is said as to possession; there is nothing in the use of such phrases as "to go and be held" and "for the time being" from which it would be right to infer an intention to defeat the absolute interest of the tenant in tail unless he came into actual possession, and the chattels themselves are not of such a character as not to be capable of being used and enjoyed elsewhere than in the settled mansion-house.

I cannot treat this bequest as an exception to the general rule, and, in my opinion, these chattels vested absolutely in the late Charles Thomas Beresford-Hope, and such of them as still remain

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EVE J. unsold and the proceeds of any that have been sold now belong to
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BERESFORD- The second set of chattels, in the events which happened, was
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— limited, declared, and contained of and concerning the Bedgebury
estate, yet so nevertheless that none of the same chattels shall, for
the purpose of transmission, vest absolutely in any tenant in tail by
purchase of the same estate who shall not attain the age of twenty-
one years.” The canons of construction with which I have been
dealing in considering the destination of the first set of chattels
apply to an assignment or bequest of personalty immediate or by
way of trust executed ; but in respect of this second set of chattels
the testator has created an executory or executive trust, and, the
intent being clear and precise that the personalty shall follow the
limitations of the realty so far as the rules of law and equity will
permit, the will must be executed : *Shelley v. Shelley* (1) ; *Miles v.*
Harford. (2)

That being so, the only remaining question is how such a trust
shall be executed, and the answer to this question is, I think,
supplied by the precedent adopted by conveyancers in their most
recent publications. The trusts are—I am reading with immaterial
abridgment from p. 971 of the 2nd volume of the 21st edition of
Prideaux's Precedents ; a similar form is to be found at p. 783 of
vol. ii. of the 10th edition of *Key and Elphinstone*, and on p. 438
of vol. ii. of the 1915 edition of *Bythewood and Jarman*—“ Upon
trust that my trustees shall allow the same to devolve and be
enjoyed, so far as the law permits, as heirlooms, along with the
settled freeholds, but so that they shall not vest absolutely in
any person being tenant in tail male or in tail by purchase who
dies under the age of twenty-one years, or who dies before
he becomes entitled to the actual possession of the heirlooms,
or who dies before the expiration of twenty-one years from the
determination of all estates for life preceding his estate in tail male
or in tail without, in either of the two last mentioned cases, having
with the consent of the protector of the settlement (if any) either

(1) L. R. 6 Eq. 540.

(2) 12 Ch. D. 691.

barred the entail in all the settled freeholds, or declared by deed that the heirlooms, or any of them, should (without prejudice to any prior interest) vest in him absolutely, but on the death of any such person before attaining an absolutely vested interest in the heirlooms, the same shall go and devolve in the same manner as if they had been freeholds of inheritance and had been included in the settlement." I must give effect to the executory trust created by the testator's will by treating these chattels as settled upon the trusts I have just read, and by so doing I exclude any possible claim on behalf of the late Mr. Charles Thomas Beresford-Hope's estate, and leave them or their proceeds to devolve on his son, the defendant Mr. Harold Thomas Beresford-Hope.

The proceedings being of an entirely friendly nature, instituted for the purpose of ascertaining the respective rights of mother and son, no order as to costs is necessary. The order will be dated as of the day when I heard the case and gave the result of my decision.

Solicitors : *Walker, Martineau & Co. ; Martineau & Reid.*

G. M.

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Railway Company—Special Act—Deposited Plans—Incorporation in Special Act—Cardiff Railway Act, 1906 (6 Edw. 7, c. clvii.), ss. 2, 3, 4, 13, 14, 15—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 14, 16—Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), ss. 9—11.

By the Cardiff Railway Act, 1906, which incorporated the Railways Clauses Acts so far as they were applicable to and not varied by or inconsistent therewith, the Cardiff Railway Company was empowered to make a short line joining its railway with that of the Taff Vale Railway Company "in the line and according to the levels shown on the deposited plans." The deposited plans indicated that the junction line would be carried on an embankment in order to bring it up to the level of the two railways which were to be connected. Alongside the Taff Vale Railway was a narrow strip

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of land which that company had acquired for the purpose of sidings not yet constructed. The Cardiff Company originally proposed to purchase so much of this strip as was necessary to enable them to carry their embankment over it, but the special Act as passed provided that the Cardiff Company should not purchase any portion of the strip, but should acquire an easement or right of using the same for the purpose of the junction authorized. The Cardiff Company served upon the Taff Vale Company a notice to treat for the purchase of an easement or right over the portion of the strip in question for the purpose of making a solid embankment across it in order to effect the junction.

The Taff Vale Company brought an action to restrain the Cardiff Company from proceeding upon their notice to treat on the ground that they were not authorized by their Act to construct a solid embankment and that the notice was consequently invalid. The Taff Vale Company contended that an embankment would prevent their using the strip for the purpose of sidings and that the junction line ought to be carried over the strip upon a bridge. The Cardiff Company contended that the deposited plans indicated an embankment, and that under s. 14 of the Railways Clauses Consolidation Act, 1845, and ss. 9—11 of the Railways Clauses Act, 1863, they were bound to make the connection in that way.

Astbury J. held that the notice was valid and dismissed the action:—

Held, on appeal, following *North British Ry. Co. v. Tod* (1846 12 Cl. & F. 722, that the deposited plans were obligatory on the company only so far as they were expressly or by implication made so by the special Act, whereas in that Act the only matters expressly referred to were the “line” and “levels.” The plans dealt with land which the company proposed to purchase and indicated what should be done on that land when purchased. The conditions were changed when purchase was prohibited, and the qualified incorporation of the general Acts applied to land which the Cardiff Company could not acquire. There being two practicable modes whereby the company might cross the strip, namely, an embankment and a bridge, and Parliament not having prescribed the mode by which the crossing was to be effected, the Cardiff Company were not entitled to select that mode which was the more burdensome to the Taff Vale Company, and that company ought not to be required to grant an easement more extensive than the purposes of the junction demanded. The notice to treat was therefore invalid.

Decision of Astbury J. reversed.

APPEAL from a decision of Astbury J.

The railways of the plaintiff and defendant companies run through the parish of Pontypridd at a short distance from each other. The Cardiff Company were desirous of effecting a junction with the Taff

Vale main line, and in 1897 the Cardiff Railway Act of that year was passed for the purpose of carrying out that object, but for certain reasons it proved ineffectual. In 1906 the Cardiff Railway Act (6 Edw. 7, c. clvii.) was passed, by s. 3 of which the Cardiff Company were empowered to make a new line joining their railway to the Taff Vale Railway "in the line and according to the levels shown on the deposited plans." The deposited plans indicated that the proposed new line would be carried on an embankment in order to bring it up to the level of the two railways which were to be connected. At the foot of the embankment of the Taff Vale Railway where the proposed junction was to be effected there was a strip of land running for some distance alongside the railway and intended to be used by the Taff Vale Company at a future time for the purposes of a mileage siding. It was necessary for the new line to cross this strip of land before it could join the embankment on which the metals of the Taff Vale Railway were laid. In the Bill forming the basis of the Act of 1906 it was proposed that the Cardiff Company should acquire that portion of the strip together with so much of the embankment of the Taff Vale Railway as was necessary to carry the rails of the Cardiff Company to a junction with those of the Taff Vale Railway. The Taff Vale Company, however, opposed this in Parliament, and by s. 4 of the Act as passed it was provided that "the company shall not under the powers of this Act purchase or take the lands belonging to the Taff Vale Railway Company shown in green on the plan," being the portion of the strip in question, "but the company may purchase and take and the Taff Vale Railway Company shall sell and grant to the company an easement or right of using the same for the purposes of the junction by this Act authorised."

Sect. 2 of the Act incorporated the Lands Clauses Acts, the Railways Clauses Consolidation Act, 1845, and Parts I. and II. of the Railways Clauses Act, 1863, so far as they were applicable to and were not varied by or inconsistent with the special Act.

On July 6, 1914, the Cardiff Company gave a notice to treat, the validity of which was in dispute in this action. The notice stated that the company required to purchase and take in and over the lands in question an easement and right for the purpose of making, maintaining, and using a junction between the Cardiff Railway and the

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Taff Vale Railway. The nature of such easement and right was described as follows: "The easement and right of laying and placing and thereafter using inspecting and maintaining the railway together with all convenient and necessary works and other apparatus requisite for effecting the junction between the Cardiff Railway and the Taff Vale Railway in the manner shown and delineated in large scale on the plan marked 'B' delivered herewith and the right or easement of depositing upon the said lands the material necessary for constructing an embankment to carry the said railway together with such rights of entry and passage as may be necessary for constructing the said railway and embankment and for effecting the said junction."

This action was brought by the plaintiff company, alleging that the notice to treat was invalid and claiming a declaration that the defendants the Cardiff Company in respect of the lands in question were not entitled to exercise the powers of entry conferred by s. 85 of the Lands Clauses Consolidation Act, 1845. The material clauses of the special and general Acts upon the construction of which the question in the action turned are set out in the judgments of the Court.

Astbury J. held that the notice to treat was valid and dismissed the action; and from that decision the Taff Vale Company appealed.

P. O. Lawrence, K.C., and *A. F. Topham* (for *F. H. Schwann*, serving with His Majesty's Forces), for the appellants. The notice to treat is invalid. The proposed method of effecting the junction by means of a solid embankment is not authorized by the terms of the special Act. It is said that the deposited plans are incorporated in the Act, and that they show an embankment as the means of crossing the strip of land belonging to the Taff Vale Company; but the plans are only incorporated in the Act "to the extent of the lines and levels": *North British Ry. Co. v. Tod.* (1) The particular mode of effecting the junction must be determined in the manner provided by s. 13 of the special Act before any valid notice to treat can be served upon the landowner, the Taff Vale Company. Sect. 13 provides that any difference "as to the mode of effecting" the junction is to be decided by an engineer. Under the

Act the Cardiff Company are only entitled to acquire an easement over the land of the Taff Vale Company, but what they propose to treat for is practically the absolute possession of the land. There being two ways of carrying out what is necessary, the Taff Vale Company are entitled to require that the method which is least burdensome to them shall be adopted. The general Acts are only incorporated in the special Act so far as they are applicable and not inconsistent with the special Act: *Dyce v. Hay* (1); *Great Western Ry. Co. v. Swindon and Cheltenham Extension Ry. Co.* (2); *Metro-politan Ry. Co. v. Fowler* (3); *Manser v. Northern and Eastern Counties Ry. Co.* (4); *Reg. v. East and West India Docks and Birmingham Junction Ry. Co.* (5)

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Hon. Frank Russell, K.C., J. G. Wood, and Hon. Trevor Lewis, for the respondents. It is said that the notice is bad because it claims the right to cross the Taff Vale Company's strip of land by means of an embankment. That depends upon the construction of the special Act of 1906 and the incorporated Acts. Parliament has given the Cardiff Company a certain right, and the Court will not inquire whether that right apart from the statute may or may not be an easement which could be acquired by grant or prescription. The Act of 1906 authorizes a deviation of the line which was authorized by the Act of 1897. Reading in s. 14 of the Railways Clauses Consolidation Act, 1845, and considering ss. 3 and 4 of the Act of 1906, the Cardiff Company is entitled to make the railway in the line and at the levels shown on the deposited plans and for that purpose to use the strip of land in question, and they have no power to substitute for the solid embankment shown on the deposited plans a viaduct without the certificate of the Board of Trade. The Cardiff Company have therefore an enactment empowering them to make the junction line upon an embankment with a right to use the strip of land for that purpose.

Under the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, it is not necessary for the Cardiff Company to select the mode of junction which shall do least damage to the Taff Vale Company. The proviso only means that when the mode is selected the

(1) (1852) 1 Macq. 305.

(3) [1893] A. C. 416.

(2) (1884) 9 App. Cas. 787.

(4) (1841) 2 Ry. Cas. 380.

(5) (1853) 2 E. & B. 466, 474.

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Cardiff Company shall in carrying it out do as little damage as can be. "The proviso," in the words of Lord Campbell, "does not affect the work to be done," but only the manner of doing it: *Reg. v. East and West India Docks and Birmingham Junction Ry. Co.* (1) Sect. 14 of the Act of 1845 is a specific enactment, which has to be read into the special Act, that if the deposited plans show or describe an embankment, that is not to be altered without certain leave. That is incorporated into the special Act, s. 3 of which gives us the right to make our railway from point to point according to certain lines and levels. That means a railway carried upon an embankment which cannot be altered by turning it into a bridge. Then by s. 4 we get the right to use the strip of land for the purposes of the embankment, which the Legislature says must not, without the leave of the Board of Trade, be turned into a bridge. That is the main point of the case. The Taff Vale Company knew all along we were going to make our railway on an embankment, and they deliberately elected not to ask for any protective conditions.

Then with regard to s. 13 it is said that, assuming that an embankment is within the scope of the private Act, still the question of embankment or bridge must be left to the determination of the engineer under s. 13. Sect. 13 has no application to that point at all. The words "the mode of effecting such junction" refer to the nature of the works to be done for the purpose of effecting the physical union between the rails of the two companies. The mode in which the Cardiff line is led up to the junction, whether by an embankment or a bridge, is immaterial for this purpose. In the Court below the appellants relied upon s. 11 of the Act of 1863, but that does not help them, because the section is limited by the phrase "intercommunication between the railways as shown on the deposited plans and sections," and the intercommunication between these railways as shown on the deposited plans is by embankment.

Again, the section only applies to any interference with any railway or any of the works thereof. We are not doing that. The object of the clause is merely temporary, that is, while the junction is being effected. There is to be no more interference with the company or its works than is necessary.

(1) 2 E. & B. 466, 474.

This strip of ground is no part of the Taff Vale Company's works within the meaning of that section. When the deposited plan shows something which the general Act requires to be in it, then the incorporation of the general Act brings the deposited plan into the special Act. [They referred also to *Little v. Newport, Abergavenny and Hereford Ry. Co.* (1), *Dublin and Drogheda Ry. Co. v. Navan and Kingscourt Ry. Co.* (2), *Reg. v. South Wales Ry. Co.* (3), *Wilkinson v. Hull Railway and Dock Co.* (4), and *Roderick v. Aston Local Board.* (5)]

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P. O. Lawrence, K.C., in reply. Under s. 4 the Taff Vale Company is not bound to create and sell any easement which is more burdensome than is essential to connecting the two railways. Parliament has not sanctioned the acquisition by the Cardiff Company of an easement for an embankment. The Taff Vale Company is not bound to create such an easement, although of course Parliament might have done so. The crossing of the strip of land is the mode of effecting the junction between the two lines. The junction begins at the point where the Cardiff line leaves their land to get on to that of the Taff Vale Company. The method of constructing an embankment comes within the words "the mode of effecting the junction." The matter comes within that which, by s. 13, must be settled by reference to the engineer.

Cur. adv. vult.

Nov. 20. LORD COZENS-HARDY M.R. This appeal raises a question of the validity of a notice to treat served by the Cardiff Company upon the Taff Vale Company. In order to appreciate the question it is necessary to give a short summary of the position of the two companies.

The main line of the Taff Vale Company runs through the parish of Pontypridd to Cardiff. There are four lines of metals. The traffic, especially the mineral traffic, is very heavy. The Cardiff Company were anxious to get a competing line, and for that purpose they required to effect a junction with the Taff Vale main line. The Cardiff Railway Act, 1897, purported to secure this, but, for reasons

(1) (1852) 12 C. B. 752.

(3) (1850) 14 Q. B. 902.

(2) (1871) Ir. R. 5 Eq. 393.

(4) (1882) 20 Ch. D. 323.

(5) (1877) 5 Ch. D. 328.

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which I need not mention, the company found the Act of 1897 insufficient, and in 1906 a new scheme was brought forward, and to some extent sanctioned by the Cardiff Railway Act, 1906, and it is under this Act that the notice to treat was given.

The Taff Vale Company had purchased under compulsory powers a strip of land about fifty feet wide bounded on the west by the embankment on which the metals of their main line are placed. It was required for mileage sidings. Plans for that purpose were prepared, but the work has not been begun. The authorized Cardiff line ran up to the edge of the strip, which is coloured green on the plans, but no further. The Cardiff Company promoted a Bill for enabling them to purchase and take the green strip and also so much of the Taff Vale embankment as was not actually occupied by the metals. The deposited plans indicated an embankment by means of which the connection with the Taff Vale would be effected. The Bill was stoutly opposed by the Taff Vale Company. The Act as passed did not give the Cardiff Company the right to purchase and take the strip, but entitled them to have what may be called a parliamentary easement or right of user. No such easement or right of user could be granted at common law. The material sections are ss. 2, 3, 4, sub-s. 1, 13, 14, and 15. Sect. 2 is: "The Lands Clauses Acts and the Railways Clauses Consolidation Act, 1845, and Part I. (construction of a railway) and Part II. (extension of time) of the Railways Clauses Consolidation Act, 1863 (so far as they are applicable for the purposes of and are not varied by or inconsistent with this Act) are hereby incorporated with this Act." Sect. 3 is: "Subject to the provisions of this Act the company may make and maintain in the line and according to the levels shown on the deposited plans and sections the railway hereinafter described with all proper stations sidings approaches works and conveniences connected therewith and may enter on take and use such of the lands delineated on the said plans and described in the deposited books of reference as may be required for those purposes (that is to say):—A railway 1 furlong 9 chains in length (being a deviation of a portion of railway No 4 authorised by the Act of 1897) wholly in the parish and urban district of Pontypridd in the county of Glamorgan near the Treforest Tin Plate Works and terminating by a junction with the Taff Vale Railway near the points at the junction

of the Barry Railway with the two westernmost lines of the Taff Vale Railway at Treforest." Following that perfectly general clause there is an exception which is introduced in s. 4, and which is a very important exception. Sect. 4, sub-s. 1, is: "The company shall not under the powers of this Act purchase or take the lands belonging to the Taff Vale Railway Company shown in green on the plan"—that is what I call the fifty feet strip—"but the company may purchase and take and the Taff Vale Railway Company shall sell and grant to the company an easement or right of using the same for the purposes of the junction by this Act authorised." Sect. 13 provides: "The junction of the railway by this Act authorised with the Taff Vale Railway shall be a junction of the said railway with all the four lines of the Taff Vale Railway and in case any difference shall arise as to the mode of effecting such junction the same shall be referred on the application of the Taff Vale Railway Company the Barry Railway Company or the company to the determination of an engineer to be appointed by the president for the time being of the Institution of Civil Engineers." Sect. 14 says: "The company shall so far as their powers extend simultaneously with the opening for public traffic of the railway by this Act authorised provide in connexion with the junction of the railway by this Act authorised with the Taff Vale Railway sidings reasonably sufficient in length and extent for the accommodation of the traffic to and from such junction" Sect. 15 says: "The traffic of the company at and approaching the junction between the railway by this Act authorised and the Taff Vale Railway shall be worked in such manner as to involve no shunting on the main lines of the Taff Vale Railway"

On July 6, 1914, the Cardiff Company gave a notice to treat, the validity of which is disputed in this action. The notice to treat in substance was this: that the company required "to purchase and take in and over" the lands coloured green—that is the strip—on the plan marked "A" attached thereto "an easement or right for the purpose of making constructing maintaining repairing and using a junction between the Cardiff Railway and the Taff Vale Railway," and the description of such easement or right is contained in further paragraphs of the notice. Those paragraphs state that "the said railways will be carried on an embankment" and that

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the maximum width will be so and so—I need not trouble with that—and the maximum height will be so and so, which again I need not trouble with, and they also say: “The easement and right of laying and placing and thereafter using inspecting and maintaining the railways together with all convenient and necessary works and other apparatus requisite for effecting the junction between the Cardiff Railway and the Taff Vale Railway in the manner shown and delineated in large scale on the plan marked ‘B’ delivered herewith and the right or easement of depositing upon the said lands the material necessary for constructing an embankment to carry the said railway together with such rights of entry and passage as may be necessary for constructing the said railways and embankment and for effecting the said junction.”

On September 11, 1914, this was followed up by a notice and subsequent proceedings under s. 85 of the Lands Clauses Act, 1845, and the Cardiff Company claimed to be entitled to enter forthwith. If the notice to treat is valid, the subsequent proceedings are regular.

In these circumstances the Cardiff Company contend that the deposited plans indicate an embankment and not a bridge, and that by reason of the provisions of s. 14 of the Railways Clauses Consolidation Act, 1845, and ss. 9—11 of the Railways Clauses Act, 1863, they are not only entitled, but bound, to make the connection by means of an embankment. I am unable to accept this view. It has been settled by the House of Lords in the case of *North British Ry. Co. v. Tod* (1) that the deposited plans and sections are not all obligatory upon the company, but only so far as they are expressly or by necessary implication made obligatory by the special Act. In the Cardiff Railway Act of 1906 the “line” and the “levels” are the only matters expressly referred to. Moreover the deposited plans were dealing with land, (inter alia with the green strip), which the Cardiff Company proposed and intended to purchase, and they indicated what would be done by the Cardiff Company on the land when purchased. The conditions were changed when purchase was prohibited, and I do not think the qualified incorporation of the general Acts in s. 2 of the Act of 1906 applies to land of which the Cardiff Company are not, and cannot become, owners. In my view Parliament has enabled the Cardiff Company to get across the green

(1) 12 Cl. & F. 722.

strip on the necessary level, but has not decided the particular mode by which the crossing is to be effected. If only one mode is reasonably practicable the Taff Vale Company cannot object to that mode. But if there are two practicable modes, namely, an embankment and a bridge, I am not prepared to say that the Cardiff Company can, at their own will and pleasure, select the more burdensome mode. The Taff Vale Company ought not to be required to grant an easement or right of using for the purposes of the junction more extensive than the purposes of the junction demand.

It follows that in my opinion the notice to treat is bad. It proposes to purchase that which, at the present moment, the Cardiff Company have no right to compel the Taff Vale Company to sell. This is sufficient to dispose of the appeal.

I do not propose to discuss whether the Cardiff Company can, by a new notice to treat, get over the difficulty, either by an application to Sir James Inglis, the arbitrator, under s. 13, or otherwise.

With great respect to Astbury J., I think the appeal must be allowed and an order made in the terms of the notice of appeal.

WARRINGTON L.J. The defendants, the Cardiff Railway Company, by their Act of 1906 were authorized to construct a short line of railway and to effect a junction thereof with the main line of the plaintiffs, the Taff Vale Railway Company.

The line of the plaintiffs at the place where the junction is to be made runs nearly north and south and is carried on an embankment. The new line of the defendants comes in on the east side of the plaintiffs' line and is also on an embankment. Immediately at the foot of the slope of the plaintiffs' embankment is a strip of land about fifty feet wide acquired by the plaintiffs under compulsory powers in 1898 and intended by them to be used for a "mileage siding." By s. 4 of the Cardiff Railway Act, 1906, the defendants are prohibited from purchasing or taking the strip or the slope of the plaintiffs' embankment, but are authorized to purchase and take, and the plaintiffs are required to sell and grant to them, "an easement or right of using the same for the purposes of the junction by this Act authorised." Under this provision the defendants claim the right to purchase and to compel the plaintiffs to sell the right to continue the embankment carrying their new line upon the

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strip of land and the slope of the plaintiffs' embankment, and have given a notice to treat for the purchase of that right. The sole question for decision is whether the defendants have in fact the right they claim. If they have not, the notice to treat would be in excess of their powers, and the plaintiffs would be entitled to a declaration accordingly and to an injunction restraining the defendants from exercising the powers of entry conferred by ss. 84 and 85 of the Lands Clauses Consolidation Act, 1845, as they are proposing to do. Astbury J. has dismissed the plaintiffs' action; hence this appeal. The Court has only to determine the question stated above; it is no part of its duty to say what right the defendants have if they have not the right they claim. What then is the meaning of "an easement or right of using the land for the purposes of the junction"? It is clearly something short of total expropriation of the land. On general principles it may, I think, be assumed that where Parliament gives one man a right for a specified purpose to buy an undefined interest in another man's property it does not intend that such interest should be larger or more extensive than is reasonably necessary for accomplishing the particular purpose.

Now in this case to construct an embankment on the land would for all practical purposes be to exclude the plaintiffs altogether from the land occupied by the embankment, for though it is true that in law the new surface thus created and the body of the embankment itself would be the property of the plaintiffs, it would be of no practical use to them. It is said they might run a tunnel through it, but I apprehend they would run some risk of letting down the defendants' line, especially having regard to the very small space there would be between the line and the roof of any tunnel which would be of the slightest use to the plaintiffs. It is clear that, though no doubt to carry their line by an embankment across the strip would be less expensive and more convenient to the defendants than the alternative plan of a bridge, it is not reasonably necessary to do so for accomplishing the purpose of making a junction with the plaintiffs' line.

I am of opinion, therefore, that upon the true construction of s. 4 of the Act of 1906 the defendants are not entitled to purchase and take the right they claim. It is said that even if the defendants

construct a bridge this would necessitate the exclusive occupation of some parts of the land by abutments, piers, and so forth. This may be true, but if such occupation be necessary for accomplishing the purpose, then it would, in my opinion, be justified by the Act.

But the defendants say that under the Act of 1906 read as a whole with the Railways Clauses Consolidation Act, 1845, and in particular with s. 14 of that Act, they are not only entitled, but are bound, to construct the embankment. The deposited plans indicate an embankment at the place in question, and the defendants insist that, this being so, they are not entitled to substitute a bridge for this without the certificate of the Board of Trade. I think the answer is that the operation of s. 14 of the Railways Clauses Consolidation Act, 1845, is controlled by the provisions of the special Act, and if, as I think is the case, the latter gives the defendants no right to construct an embankment, the provisions of s. 14, so far as they are inconsistent with this, are of no effect.

In the view I take of the true construction of s. 4 of the Act of 1906 it is unnecessary for the purposes of this case to decide whether under s. 13 of the Act of 1906 the question as to the mode in which the railway is to be carried over the strip of land is to be settled in the manner thereby provided. I will only say that I am not satisfied that the words "mode of effecting the junction" ought to bear the narrow construction contended for by the defendants. It seems to me to be unnecessary to consider the early history of the relations of the two companies or their conduct in reference to this matter of the junction; we have to decide the question of strict right, and this depends on the true construction and effect of the Act of 1906.

I think the appeal ought to be allowed and a declaration made substantially as asked by the statement of claim.

SCRUTTON L.J. This appeal raises a question of some difficulty as to the validity of a notice to treat under the Lands Clauses Act served by the Cardiff Railway Company on the Taff Vale Railway Company in respect of certain rights over land belonging to the Taff Vale Company, which the Cardiff Company desires to acquire and use for the purposes of a short railway joining their line with that of the Taff Vale Company.

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The material facts are as follows : In 1897 the Cardiff Company desired to make a junction with the Taff Vale Company's line, and obtained an Act giving them compulsory powers to do so. There was a flaw in this Act, the nature of which it is unnecessary to specify, which prevented its working effectively. In 1906 the Cardiff Company came to Parliament for further powers. At this time the Taff Vale Company owned by the side of their line, which was on a raised embankment, a strip of land which they had in contemplation to lay out and use as a siding. To effect a junction with the Taff Vale line the Cardiff Company's line must cross this strip of land at a higher level, and must do so either by an embankment or a bridge or viaduct. In 1906 the Cardiff Company deposited plans, which it is common ground showed a crossing of this land by a solid embankment, and introduced a Bill giving them power compulsorily to purchase so much of the strip of land (including any lands of the Taff Vale Railway Company not actually occupied by their running lines) as might be required for the purposes of a railway "in the line and according to the levels shown on the deposited plans and sections." The Bill was opposed by the Taff Vale Company, and, while in the Cardiff Railway Act, 1906, as passed the Cardiff Company were authorized "to make and maintain in the line and according to the levels shown on the deposited plans and sections the railway hereinafter described," it was provided by s. 4 that the Cardiff Company should not purchase or take the Taff Vale lands coloured green on a certain plan. This coloured portion included a part of the strip beside the Taff Vale line and a portion of the Taff Vale embankment itself, on which it was proposed that the new line should be made. But it was further enacted that "the Cardiff Company may purchase and take and the Taff Vale Company shall sell and grant to the company an easement or right of using the same"—that is the coloured lands—"for the purposes of the junction by this Act authorised." Matters moved very slowly : the Taff Vale Company, to put it mildly, did nothing to facilitate the junction ; the Cardiff Company were not very skilful in their attempts to effect a junction, and one of their notices to treat was held bad by the Courts. At last in 1914 the Cardiff Company served a notice to treat requiring "to purchase and take . . . an easement or right for the purpose of constructing . . . and using a junction between

the Cardiff Railway and the Taff Vale Railway" in the manner delineated on plan "B." This plan showed a solid embankment of a specified width and height crossing the Taff Vale's land to the Taff Vale raised line. Thereupon the Taff Vale Company started this action for a declaration that the Cardiff Company were not entitled to the right which they claimed in their notice to treat. The Taff Vale Company alleged that an embankment or the right to build it could not be an easement, or, at any rate, was a greater use of their property than was necessary for the purpose of the junction, which could be adequately or satisfactorily effected by a railway on a bridge, which would not completely occupy or sever their land. The Cardiff Company replied that their deposited plans showed an embankment which was authorized by their statute, and that the effect, if any, of severance of the Taff Vale land could be dealt with afterwards on an application for increased compensation, or for accommodation works.

Astbury J. has held that the Cardiff Company is given by statute a right to use the Taff Vale Company's land "for the purpose of bringing up the level thereof necessary to make the junction of the new line with the old in accordance with the deposited plans," that is, by an embankment, and that the notice to treat is therefore good, as the right proposed to be purchased is conferred on the Cardiff Company by statute. The Taff Vale Company appeals. It is common ground that the plans deposited in this case show a solid embankment. What then is the effect of deposited plans? The result of the decision of the House of Lords in *North British Ry. Co. v. Tod* (1) is clear. A plan can have no avail as a representation which must be made good. It is a proposal which is only of effect "so far as its representation is incorporated and made part of the Act of Parliament"; "the plan is . . . not to be referred to for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the Act" (both passages from Lord Cottenham's judgment). Lord Campbell says "There certainly was a representation" (by the deposited plans as to surface levels). Then he says "That Act of Parliament must be considered as overruling and doing away with everything that had taken place prior to the time when the Act of

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(1) 12 Cl. & F. 722, 732, 735.]

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Parliament passed, and renders the representation or proposal of the company pending the Act of Parliament of no avail." In that case, therefore, though the deposited plans showed a deep cutting and a low bridge with train out of sight and bridge inconspicuous, and the railway company proposed a shallow cutting and high bridge with train in full view and bridge a "deformity," as the Act of Parliament only incorporated the plans as to "line and datum level," the complainant had no remedy. Lord Campbell again repeats the same principle in *Reg. v. Caledonian Ry. Co.* (1): "The mere exhibition of these plans and sections whilst the Bill was depending in Parliament does not make them obligatory on the promoters after the Act has passed, unless there be something in the special Act when passed, or in the general Act with which it is incorporated, which requires that the plans should be followed." In *Attorney-General v. Great Eastern Ry. Co.* (2) Mellish L.J. says: "It has been settled law since the case of *North British Ry. Co. v. Tod* (3) that a company is not bound by the mere fact of a representation having been made on a plan deposited by them, unless the representation is incorporated in the Act." If the company is not bound, neither can the landowner be bound. One must see, therefore, whether the embankment shown on the plans is imposed on the landowner, the Taff Vale Company, by the special Act. Now the special Act of 1906 by s. 3 empowers the Cardiff Company "to make and maintain in the line and according to the levels shown on the deposited plans and sections the railway hereinafter described with all proper . . . works." This only incorporates the deposited plans in respect of "line and levels," which do not, in my opinion, include the nature of the construction by which the line or levels are maintained or carried. I do not understand that the Cardiff Company allege that these words do have that effect, but they say that the embankment, or mode of construction on the deposited plans, is made binding by the incorporated provisions of the Railways Clauses Consolidation Act, 1845. They especially refer to s. 13 of that Act, which reads "Where in any place it is intended to carry the railway on an arch or arches or other viaduct, as marked on the said plan or section, the same shall be made accordingly,"

(1) (1850) 16 Q. B. 19, 30.

(2) (1872) L. R. 7 Ch. 475, 482.

(3) 12 Cl. & F. 722.

and to the preamble and third provision of s. 14, which says "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions; (that is to say) It shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate as aforesaid from the Board of Trade." And they say that here the plan did show an embankment, and not a viaduct or bridge or arches, and it is therefore unlawful to alter this without the sanction of the Board of Trade. Now by s. 2 of the special Act these clauses are only incorporated "so far as they are applicable for the purposes of and are not varied by or inconsistent with this Act." Thus in *Attorney-General v. Great Eastern Ry. Co.* (1) the plans proposed to cross S. Street on an arch, but the special Act contained a provision that the company might stop up all streets in a particular area which included S. Street. It was held that the special Act controlled and overruled the provisions of the 13th and 14th sections of the Railways Clauses Consolidation Act as to bridges, and that the company need not make the bridge shown on the plans. What then does the special Act in this case provide? Whereas the plans and Bill proposed to take the Taff Vale lands for an embankment, s. 4 of the special Act provides that the Cardiff Company shall not take or purchase these Taff Vale lands, but the Cardiff Company may purchase and take and the Taff Vale Company shall sell and grant to the Cardiff Company "an easement or right of using the same for the purpose of the junction by this Act authorised." This, in my view, is an option to the Cardiff Company to take a parliamentary grant of a right to use the Taff Vale lands for the purposes of the junction. The means of user is not specified, but as it is a compulsory grant, not of the whole interest in the lands, but of a limited user of them, I think it is clear that this should be limited to such a right of user as is necessary for the purpose of the grant and no more. This is the same principle which Sir George Jessel applied to "ways of necessity" where he said in *London Corporation v. Riggs* (2): "If that is the true rule that he is not to have more

(1) L. R. 7 Ch. 475.

(2) (1880) 13 Ch. D. 798, 807.

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than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant." Now here the deposited plans, incorporated as to levels in the special Act, clearly show that the new line is to cross above the level of the existing land. This may be by a bridge of a single span, on one or more piers, or by a solid embankment. It is sufficient to say that a solid embankment is obviously not the least onerous use of the servient land. The embankment occupies all the surface of the strip of land and entirely excludes the previous owner and severs his land. The bridge occupies only so much of the land as is occupied by its piers, if any, and does not sever the land except by its piers. It is impossible to say that s. 4 of the Act of 1906 by itself is necessarily or even probably the grant of an embankment; the situation seems to be that described by Lord Bramwell in *Great Western Ry. Co. v. Swindon and Cheltenham Extension Ry. Co.* (1): "What right had the respondents"—that is the Cardiff Company—"to act"—that is by a notice to treat—"as though these easements were granted to them before they were granted, and before the extent and limits of the right, and how it was to be enjoyed, were ascertained?" I am therefore of opinion that, as the special Act does not incorporate the provision in the plans for an embankment crossing the Taff Vale lands, the provision in the general Act incorporated, namely, that it shall not be lawful for the company to deviate from the engineering works described in the plan—that is an embankment—except with the authority of a certificate of the Board of Trade, is not "applicable to the purposes of this Act," as the embankment in question, though described on the plans, is not made part of the special Act, which only confers a lesser benefit on the Cardiff Railway Company, a lesser burden on the landowner. This would be enough to decide the case; but it was also put from the point of view of the landowner in another way, which, as it is of general importance, I desire to consider. It was said that this Act gives an easement, and that an embankment which appropriates the whole of the land and excludes beneficial ownership by the landowner could not be an easement. An easement of appropriating the whole land was not

known to the law. If the exercise of any easement did appropriate the whole land, it was because the part appropriated was so small and so incidental to the use of a wider easement that the law overlooked it. Thus in *Escott v. Newport Corporation* (1) the space occupied in land by tramway standards was held not to be land taken within the Lands Clauses Act, and in *Chelsea Waterworks Co. v. Bowley* (2) the space occupied in land by water pipes was held not to be land, or an interest in land, but an easement. And it was said that a solid embankment was far beyond a negligible quantity of space. Now it is undoubted that Parliament and parliamentary draftsmen have used the term "easement" in relation to various rights which no lawyer would ordinarily describe as "easements." The Cardiff Railway Act of 1897 talks about the "easement or right of constructing a tunnel." In the various stages of *Metropolitan Ry. Co. v. Fowler* (3) the position of such a tunnel was discussed, and it was held by the House of Lords to be far more than an easement, the company having an interest in the land comprised in the tunnel. "There is no easement known to law which gives exclusive and unrestricted use of a piece of land": see per Lopes L.J. in *Reilly v. Booth*. (4) But it is clear that Parliament can confer certain rights not previously known to the law, and can call them by what names it pleases, however previously inappropriate. When Kay L.J. says in *Metropolitan Ry. Co. v. Fowler* (5): "Even an Act of Parliament cannot make a freehold estate in land an easement, any more than it could make two plus two equal to five":—I respectfully disagree with him, and think that "for the purposes of the Act" it can effect both these statutory results. And if Parliament in this case had said "an easement or right of constructing and maintaining an embankment across the land for the purposes of a railway" the Courts would and could have given effect to it. Parliament would have meant that the landowner should retain the ownership, subject to the existence of the embankment and the right of running a railway over it, and with such rights of ownership as were consistent with this "easement." The landowner could walk on the embankment without being a trespasser so long as he did not interfere with

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(1) [1904] 2 K. B. 369.

(3) [1893] A. C. 416.

(2) (1851) 17 Q. B. 358.

(4) (1890) 44 Ch. D. 12, 26.

(5) [1892] 1 Q. B. 165, 183.

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the trains ; he could cut the grass on the embankment ; he could bore holes and construct arches in the embankment so long as he did not endanger its stability. He would remain owner subject to the limited right. I do not therefore agree with this way of putting the Taff Vale case, and prefer to rest my judgment on the fact that the Cardiff Company have not been granted the power to acquire a right of using the Taff Vale lands by a solid embankment. What right have they ? My first answer is they have the right to use the lands to the extent that is necessary to cross them by an elevated railway for the purposes of the authorized junction, and no further. What this extent is would, if necessary, be decided by the Court on evidence, as was done in *Senhouse v. Christian* (1), where the jury found what use of the land was necessary to enable the grantee of a right of way to carry coals, to exercise his right commodiously. But in the Cardiff Railway Act, 1906, differences as to the mode of effecting the junction are to be determined under s. 13 by an engineer, and as these lands are to be used (s. 4) “for the purposes of the junction,” I think differences of opinion as to the way of using them come within the words “differences as to the mode of effecting the junction,” and a mode of deciding these differences has been provided in the Act. The argument of Mr. Bethell and the judgment of the Vice-Chancellor thereon in *Great Northern Ry. Co. v. East and West India Docks, &c. Co.* (2) seem to assist this conclusion. I think I understand and to some extent sympathize with the reasons connected with the conduct of the Taff Vale Company which assisted Astbury J. to arrive at his conclusions. But I think also if the Cardiff Company had used reasonable diligence and reasonable intelligence they could have got their junction years ago, and I do not see my way to allowing the ethical merits or demerits of the parties to defeat the view I have formed as to their strict legal rights.

In my view the appeal must be allowed with costs here and below, and a declaration made that the notice to treat of July 6, 1914, is invalid, the defendants not being at present entitled to the right for which they claim to treat. I say “at present” because it is conceivable that the arbitrator might say that the embankment was the necessary means of exercising the right conferred. If it is

(1) (1787) 1 T. R. 560. (2) (1852) 7 Ry. Cas. 356, 366, 368, 369.

now a matter for the Court, I think it was in excess of the necessary means.

Appeal allowed.

Solicitors for appellants: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for respondents: *Torr & Co., for Corbett, Chambers & Harris, Cardiff.*

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Bankruptcy—Undischarged Bankrupt—Intervention by Trustee—Effect on vesting of After-acquired Property—Action commenced by Bankrupt—Application by Defendant to stay—Withdrawal of Intervention—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 54—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 18, 38, 47; s. 48, sub-s. 5; ss. 53, 54.

Where a trustee in bankruptcy has intervened in regard to after-acquired property of an undischarged bankrupt, that property vests indefeasibly in the trustee, and he cannot subsequently withdraw his intervention and so divest the property from himself and re-vest it in the bankrupt.

Decision of Eve J., ante, p. 105, reversed.

Sect. 47 of the Bankruptcy Act, 1914, is a statutory recognition of the proposition laid down in *Cohen v. Mitchell* (1890) 25 Q. B. D. 262.

APPEAL from a decision of Eve J. (1)

John Robert Hill was adjudicated bankrupt on December 19, 1908, and was undischarged. By an indenture of July 21, 1913, he entered into partnership with Victor Alfred Settle as physicians and surgeons. By a verbal agreement of September, 1913, Settle agreed to carry on the partnership alone and to apply Hill's share of profits for his benefit. On October 26, 1915, the trustee in bankruptcy wrote to Settle as follows: "I beg to give you notice that I require payment to be made by you to me of all monies which may now and hereafter be and become due from you to the bankrupt, on the ground that he has not obtained his discharge." This

(1) Ante, p. 105.

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notice was acknowledged by Settle. In March, 1916, Hill commenced an action against Settle for an account of the partnership and payment of moneys due and damages for breach of the indenture and agreement, and a statement of claim was delivered. On July 7 Settle gave notice of application to stay all further proceedings in the action until the trustee should be added as a party ; alternatively, that Hill should give security for costs. That application was adjourned into Court. On July 31 the trustee wrote to Settle's solicitor saying that as there were disputes between the parties as to the facts and he had no knowledge of what the real facts or position were, he was advised that his proper course was to withdraw the notice he gave to Dr. Settle on October 26, 1915, and he withdrew such notice accordingly.

Upon the hearing of the application Eve J. held that the notice of October 26, 1915, was an intervention by the trustee ; that it could be withdrawn ; that it had been withdrawn by the notice of July 31, 1916 ; and that the intervention was to be treated as determined as from the date of the notice of 1915.

The defendant Settle appealed.

Clayton, K.C., and *Haydon*, for the appellant. For the purposes of vesting there is a distinction between property belonging to the bankrupt before the bankruptcy and that which he acquires afterwards but before his discharge. After-acquired property only vests indefeasibly in the trustee if and when he intervenes. The question is whether when such property has vested in the trustee by reason of his intervention it can be divested from him by the withdrawal of the intervention. It is submitted that it cannot. If it could it would be possible for the trustee to divest himself of onerous property after intervention. The intervention cannot be withdrawn. The vesting sections are in the same terms with regard to property belonging to the bankrupt before bankruptcy and his after-acquired property. This case is governed by the Act of 1883, but the provisions of that Act which are material to the present question are practically identical with corresponding sections in the Bankruptcy Act, 1914. [They referred to the following sections of the later Act : ss. 18, 38 ; s. 48, sub-s. 5 ; ss. 53, 54.]

After-acquired property of the bankrupt does not vest *ipso facto*

in the trustee, but absolute vesting occurs when the trustee intervenes: *Cohen v. Mitchell*. (1) There is no statutory provision that the withdrawal of an intervention operates to divest the property.

With regard to the right of the bankrupt to sue in respect of after-acquired property the matter stood in the same way under the old Acts. Under the Bankruptcy Act, 1731 (5 Geo. 2, c. 30), commissioners were appointed to assign the bankrupt's property including that which was after-acquired, but until the assignee intervened the bankrupt could sue: *Kitchen v. Bartsch*. (2) *Herbert v. Sayer* (3) decided the same thing under the Act then in force. That was followed in *Jameson & Co. v. Brick and Stone Co.* (4) The question of the trustee's right to withdraw was really decided in *Ex parte Carter*. (5) In *Affleck v. Hammond* (6) there is a dictum by Kennedy L.J. to the effect that there was nothing to prevent the trustee from withdrawing his intervention. But that was a case of personal earnings, and it was held that as the whole or part of the money was required for the bankrupt's maintenance, he was not a mere nominal plaintiff and could not be ordered to give security for costs. There is no suggestion here that the property claimed in the action was personal earnings of the bankrupt. In any event, when the action was commenced the notice of intervention was in force, and on that ground alone the appellant is entitled to succeed.

The doctrine as to the bankrupt being the agent of the trustee with respect to after-acquired property was disposed of by Lord Esher in *In re Clark*. (7) [They also referred to *Clayton v. Le Roy*. (8)]

Maugham, K.C., and *Crossfield*, for the respondent. First, we submit that there has been no true intervention by the trustee in this case, because the notice is too wide and too vague to have any effect. It only refers to moneys which may become due and not in terms to the partnership property. Secondly, intervention to be effective must be a continuing interference. It does not refer to something which may be withdrawn. This intervention may be

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(1) 25 Q. B. D. 262.

(2) (1805) 7 East, 53.

(3) (1844) 5 Q. B. 965.

(4) (1878) 4 Q. B. D. 208.

(5) (1876) 2 Ch. D. 806.

(6) [1912] 3 K. B. 162.

(7) [1894] 2 Q. B. 393, 404.

(8) [1911] 2 K. B. 1031.

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withdrawn: *Affleck v. Hammond*. (1) *Cohen v. Mitchell* (2) does not decide that the after-acquired property of the bankrupt does not vest in the trustee until he has intervened. There is no authority that an intervention cannot be withdrawn. The property is vested in the trustee, but he may allow the bankrupt to deal with it until he intervenes. He stands by, and in that sense the bankrupt is his agent in respect of after-acquired property. The trustee having withdrawn, the bankrupt can go on to recover this chose in action and give a good discharge. *Jameson & Co. v. Brick and Stone Co.* (3) does not affect our case, and the point was not determined by *Ex parte Carter*. (4) The intervention has been properly withdrawn, and there should be no stay of proceedings.

[No reply was called for.]

LORD COZENS-HARDY M.R. This appeal raises a curious and important point which it may be is novel in its particular circumstances. The material facts can be very shortly stated. The plaintiff, Hill, became bankrupt in the year 1908. He has never obtained his discharge, and the official receiver is the trustee in his bankruptcy. According to the statement of claim, in 1913 the plaintiff entered into partnership with the defendant to carry on the profession of physicians and surgeons for a period of five years. In the same year, 1913, there was a modified agreement which, in my view, put an end to the partnership; the defendant agreed to carry on the business alone and to give the plaintiff half the profits. In October, 1915, the official receiver, as trustee in bankruptcy, served the following notice in writing upon the defendant: "Re John Robert Hill. As official receiver and trustee of the estate of John Robert Hill, described as of 456 Attercliffe Road, Sheffield, surgeon, I beg to give you notice that I require payment to be made by you to me of all monies which may now and hereafter be and become due from you to the bankrupt on the ground that he has not obtained his discharge in the proceedings." That letter, dated October 26, 1915, was given to Dr. Settle, who himself informed the plaintiff of this intervention. In those circumstances, on March 13, 1916, the writ in this action was issued against Dr. Settle.

(1) [1912] 3 K. B. 166.

(2) 25 Q. B. D. 262.

(3) 4 Q. B. D. 208.

(4) 2 Ch. D. 806.

The statement of claim was delivered in May, and then there was an application by the defendant to stay the proceedings until the trustee in bankruptcy was made a party, because in his view it was the trustee who would be entitled to any money which might become due from the defendant to the plaintiff. Then on July 31, 1916, the official receiver wrote this letter: "Referring to the action commenced by the bankrupt against Dr. Settle and the order made staying proceedings in the action until I was made a party," (that is wrong, because no such order had been made; the matter had been before the Master, who expressed no view upon it, and it was adjourned to the judge) "as there are disputes between the parties as to the facts and I have no knowledge of what the true facts or position are, I am advised that my proper course is to withdraw the notice I gave to Dr. Settle on the 26th October, 1915, and I withdraw such notice accordingly." The matter came before Eve J. on the adjournment into Court of the summons which had been before the Master.

The learned judge dealt with two points. He first of all dealt with the notice of October 26, which I will call the intervention of that date, and he said that in his view that intervention was complete; that as long as it was in force it prevented the plaintiff from maintaining his action. The learned judge says in his judgment: [The Master of the Rolls read the first part of the judgment of Eve J. (1) and continued:] With great respect to the learned judge, I think that part of the judgment is perfectly right. I cannot assent to the argument of counsel for the respondent that there is something in this notice so vague and uncertain as to prevent it from being an intervention. I think it is a perfectly good notice. There was some money alleged to be due from the defendant to the bankrupt. The statement of claim shows that what the bankrupt was claiming was this: "There is a sum of money due from you, the defendant, to me arising out of partnership transactions and arising out of the subsequent verbal agreement which in fact terminated the partnership." I cannot myself see that there is any reason to hold that the notice is bad because it does not specify more particularly the nature of the debts which may become due. I think that is a perfectly good notice, and it would be technical beyond anything to say that

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it is not a good notice. The generality of "claims for moneys becoming due" cannot be complained of. It is not a claim for all future assets; it is not general in that sense, but it is simply saying "I intervene in respect of moneys becoming due from you, Settle, to the bankrupt." I think, therefore, that the commencement of the proceedings by the official receiver was right.

Then what happened was that the intervention was withdrawn, and it is said to be withdrawn by the letter of July 31, 1916, which I have referred to. Now it is remarkable that this action was commenced at a time when the notice of intervention was in force and had not been withdrawn. My present view certainly is that upon that ground alone the action must fail. As the learned judge himself said, "I hold that the notice of October, 1915, constituted an effectual interference or intervention by the trustee and disqualified the bankrupt from instituting this action or giving a valid receipt for the moneys claimed in the writ." On that ground alone I think that the learned judge ought to have come to a different conclusion to that at which he arrived. But he based his decision on the second point. He said that the trustee had a right to withdraw, and that the effect of withdrawing that notice was to nullify the intervention which had taken place.

Now it is necessary to consider somewhat carefully what is the law upon matters of this kind. Under s. 44 of the Bankruptcy Act, 1883 (1), all the property belonging to or vested in the bankrupt, or acquired by him or devolving upon him before his discharge, is vested in the trustee. Previously the property was vested in different persons—the commissioners, or assignees, or whatever they were; it is now vested in the trustee, and after-acquired property, according to the language of the statute, is also vested in him. Then, by a long series of authorities which it is quite impossible, I think, for this Court, or any Court, to review, it was held that that vesting could not be regarded as operating in the strict and full sense of the term. As long as the trustee did not intervene, the bankrupt himself had power to enter into transactions for value with persons dealing with him bona fide in relation to his after-acquired property. That is dealt with in so many cases that I do not think it is necessary for me to refer to any more than *Cohen v.*

(1) Corresponding to s. 38 of the Bankruptcy Act, 1914.

Mitchell (1), where the earlier authorities are carefully considered, and a few passages of that judgment I must read in a moment. The Legislature has passed two Acts of Parliament, neither of which I agree expressly affects this case, because one was in 1913, the other in 1914, and this bankruptcy was in 1908. The Legislature has plainly recognized the validity and effect of that which is to be found in what is, no doubt, judge-made law as expressed in a series of decisions extending over some 200 years. Sect. 47 of the Act of 1914 provides that "All transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction." Taking the language of the section first, that in my view clearly indicates "intervention" as a point of time. It says nothing about continuous intervention, or interference continued from time to time. There is a period of time, namely, before any intervention by the trustee, during which the bankrupt's transactions, if bona fide and for value, and if completed before intervention, are valid against the trustee, and the trustee cannot impeach them; that is to say, if they are in good faith, for value, and completed, then the trustee cannot interfere with or impeach them. Then, as there was some difficulty in seeing what would follow those transactions, the Act of Parliament goes on to say that which only Parliament could say: "any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction." That enables the Court or judge to have a firm foundation for the theory established by numerous decisions, and says that that is the way in which effect is to be given to the title for value acquired by completed transactions. But how was it before that? In my view the section is an assertion of what was the common law, and really does not introduce any novelty except

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in the last few lines which imply a mode in which the title of persons with whom transactions are had is made unimpeachable.

Now, apart from the section, what was the position? In *Cohen v. Mitchell* (1), a case of the very highest authority, decided in 1890, Lord Esher says: "Of course all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee interferes? In the case of property coming under the bankruptcy, if the bankrupt were to endeavour to maintain an action in which the defendant was not estopped from denying the bankrupt's property in the subject-matter of the action, it would be a good plea that the property is not his, but is vested in the trustee; but with regard to after-acquired property, it has been held that such a plea would be bad unless it went on to shew that the trustee had intervened before the transaction in respect of which the action is brought. That seems to be conclusive to shew that the bankrupt has a property, whether absolute or not is immaterial, in such things till the trustee interferes." Then he deals with the authorities and says that they do not conflict with the view which he has expressed, and he gives judgment to that effect. Fry L.J. in his judgment, which seems to me to be extremely important, after quoting the judgment of Tindal C.J. in *Herbert v. Sayer* (2) in the Exchequer Chamber, says: "Now I adopt that view, with the single exception that I think the language 'disaffirm his act' should be interpreted to mean 'intervene,' because I do not think that the trustee who does intervene has any power retrospectively to disaffirm what has otherwise been validly done by the bankrupt; but from the moment of his intervention the property vests in him absolutely, and can no longer be recovered by or dealt with by the bankrupt."

Assuming, as in my view I have stated is the fact, that there was a good intervention, from the date of the notice the property cannot be recovered by or dealt with by the bankrupt. That seems to me to be an authority which shows that, even if the view is that

(1) 25 Q. B. D. 262, 266, 269.

(2) 5 Q. B. 965.

the property was vested in the bankrupt until intervention, that will not help the bankrupt here. I think that the truer and safer view is that which is expressed by several of the judges—that he was something in the nature of an agent who had power to deal in these transactions for value with the bankrupt's after-acquired property before intervention, but that was a right which ceased absolutely on intervention; from that moment the trustee's title was absolutely complete, and the property could no longer, in the language of Fry L.J., be “dealt with by the bankrupt.”

If that be so, the property at the date of the notice by the official receiver was vested in the trustee absolutely and the bankrupt had no power whatever henceforward to deal with it. To talk of a continuous interference, or ready and constant interference, is to talk of something which I do not understand. Interference merely indicates a punctum temporis in relation to which something may happen before or after it. What authority is there for suggesting withdrawal, if withdrawal can be effectual? If the property was at the date of the intervention absolutely and indefeasibly vested in the trustee without any power of the bankrupt to dispose of it by any transactions, what possible authority can there be for saying that there can be a withdrawal having the effect of revesting the property in some one else? There is not a vestige of authority in favour of that view. The case in which Kennedy L.J.'s dictum is to be found seems entirely distinguishable. There was nothing in the judgments of Vaughan Williams L.J. and Buckley L.J. to support it, and Kennedy L.J.'s dictum (for on the face of it it is mere dictum) does not amount to much. That was a case in which there was an assignment of a sum due for commission in respect of after-acquired property, but it was personal earnings, and probably not more than was required for maintenance; it was property which would not vest in or pass to the trustee except so far as it was not required for maintenance. There the trustee simply said “I have no title to this and my notice was given wrongly.” To give an instance: suppose the bankrupt is John Smith and the trustee sees a notice that John Smith has come into a legacy of 1000*l.*, the trustee gives notice with regard to that, and it turns out that it is not John Smith, the bankrupt, but it is another John Smith; it would be a case in which the trustee's title never did

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attach to the property. In such circumstances I feel no doubt that the trustee would be perfectly entitled to say "My intervention was due to a mistake. I never had any title to this, and, therefore, as my intervention was wrong, I simply tell you to disregard it, and I will withdraw it because it was made under a mistake." In this case, with great respect to the learned judge, I do not think that his judgment on this part of the case can stand. He says this : [The Master of the Rolls read the latter part of the judgment of Eve J. (1) and continued :]

With great respect to the learned judge, I think he overlooked the effect of the absolute and indefeasible vesting of this property in the trustee after his intervention. The learned judge does not really face the difficulty that withdrawal of a notice cannot operate as a revesting of the property in the bankrupt.

For these reasons I think that the decision of the learned judge was wrong and that the appeal must be allowed.

WARRINGTON L.J. I agree. The plaintiff is an undischarged bankrupt. He has brought an action against the defendant which is, in substance, an action to recover money alleged to be due under certain contracts entered into between the plaintiff and the defendant subsequent to his bankruptcy. The defendant alleges that the right of action is vested in the trustee in bankruptcy, and that he is therefore, to say the least of it, a necessary party to the action, and that the action ought to be stayed until he has been made a party. In substance what we have to determine is whether in the circumstances of this case the right of action is vested in the trustee. [The Lord Justice stated the facts and continued :]

The main question, and I think the only substantial question, is whether the effect of the withdrawal of the notice is to revest in the bankrupt the right of action which he seeks to enforce in the present proceedings. We are dealing here simply with an item of property which consists of a chose in action. The law, stated shortly, would appear to be this : Under the provisions of the Bankruptcy Acts, property acquired by the bankrupt, including rights of action under contracts subsequent to the date of the order of adjudication (after the commencement of the bankruptcy), is

vested in the trustee. So far the provisions of the Acts of Parliament appear to be clear. But by a long series of decisions it is now settled that, although the property is vested in the trustee, to use the words of Lord Esher in the Court of Appeal in *Cohen v. Mitchell* (1), "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." But from the moment that the trustee intervenes (using the words of Fry L.J. in the same case) "the property vests in him" (the trustee) "absolutely, and can no longer be recovered by or dealt with by the bankrupt." Therefore in the case of a chose in action, which is the only kind of property we are dealing with, I think there can be no question that the effect of the intervention by the trustee is to vest in the trustee in bankruptcy the right of action which previously was vested in the bankrupt himself. If so, then at the date when this action was commenced, and at the date when Eve J. made his order refusing the plaintiff's application, the right of action was vested in the present trustee in bankruptcy and he was a necessary party to the action.

But it is said that although the intervention of the trustee may have the effect which I have just mentioned, yet the trustee may destroy that right and restore the previously existing right of the bankrupt by withdrawing the intervention. I do not know quite, to begin with, what is meant by "withdrawing the intervention." The intervention is there: it has taken place, and it has had a certain legal operation. What the plaintiff is really contending for is that it is open to the trustee to bring about another legal position and to destroy that which is already operating, namely, by re-vesting the property in the bankrupt. In my opinion that cannot be done. If we were to hold that the intervention was capable of being revoked, we should be unduly adding another element to the judge-made law which has already modified the express words of the Bankruptcy Statutes. That, it seems to me, we are not at liberty to do. With all respect to Eve J., I think, using the words which the Master of the Rolls has already used, he has forgotten that the exercise of what he calls the discretionary power of the

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(1) 25 Q. B. D. 262, 267, 269.

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trustee has had the legal effect to which I have already referred. It is not as if the trustee had a discretionary power which he might exercise one way at one time and another way at another time; the exercise itself of the discretionary power has a certain legal effect, and it seems to me that it is not competent for the trustee to destroy that effect by something which he does afterwards.

There is only one other point. It was contended by Mr. Maugham that the notice of October 26, 1915, was not an intervention on the part of the trustee within the meaning of the rule I have referred to because it was in general terms; that is to say, a notice by the trustee requiring payment of moneys due or which had become due from the debtor to the bankrupt. In my judgment, with all respect to the argument, there is nothing in that point. The property in question is a debt due from the person to whom the notice was addressed to the bankrupt, and the notice is quite sufficient to make it improper thereafter for the debtor to pay any part of that debt to the bankrupt or to any one except the trustee in bankruptcy. It seems to me that that is quite sufficient, and it matters not a bit whether there may hereafter be moneys becoming due under other contracts to which that notice would not apply, or could not apply. I do not think it matters in the least. It was a notice with regard to an existing debt, and, so far as that is concerned, it constitutes an intervention by the trustee.

On the whole I think that the order of Eve J. was wrong and that the appeal should be allowed.

LAWRENCE J. I am of the same opinion. I need not recite the facts, and I entirely concur in what has been said by the Master of the Rolls and Warrington L.J.

It seems to me that this property, which was after-acquired property, vested in the trustee absolutely when he gave his notice of intervention; and once it had vested in him absolutely I do not think it is possible to say that anything has taken it out of him. It was argued that the notice was a bad one by reason of its being in general terms, but I think the contention that it is necessary to have a specific and particular notice in order to affect the property cannot be right. The reason is that it is a notice which has to be given by a trustee whose information may be extremely vague,

and it would be, I think, of the worst possible effect to say that he must deliver a notice actually touching the property itself in terms. In my judgment it is sufficient if he gives clear notice of the fact that he requires the payment of the property to himself. In this case he required the payment "of all monies which may now and hereafter be and become due from you to the bankrupt." That shows that he was dealing with something, or affecting to deal with something, which was contractual. I think it can only become due under some contractual relationship, such as a contract of tenancy, or a contract of partnership, or a contract of some such nature as to cause moneys to become due in the future. The trustee claims all those moneys, and thereby it seems to me he shows that he is claiming title to the rights of the bankrupt in this partnership. Eve J. says in the earlier part of his judgment (1): "When he has once made it clear that it is his intention to intervene and to assert his paramount title to the property the bankrupt is disqualified from giving a valid receipt for and from maintaining an action to recover such property." I entirely agree with that. But then the learned judge goes on to say that the trustee may determine his intervention. I think that there the learned judge ignored the fact which counsel for the appellant urged upon us, namely, that this is a matter which deals with the vesting of property. Once you look at it from that point of view it seems impossible to say that a mere notice of withdrawal will revest the property. It is quite true, as has been said by Mr. Maugham, that the property was vested in the trustee in a qualified sense before the notice of intervention; but it was only in a qualified sense, and the proposition stated in *Cohen v. Mitchell* (2) is exactly that which has been reproduced in s. 47 of the Act of 1914, as has been pointed out by the Master of the Rolls. It is evident that the section has reproduced the proposition and is, in effect, a statutory recognition of the validity of the proposition in *Cohen v. Mitchell*. (2)

I do not think that the argument that this notice of withdrawal could be treated as a re-assignment is sound. It is not in form a conveyance, and there are no words of assignment in it. To withdraw a notice cannot have the effect of re-assigning property. It is true that when the trustee has acquired after-acquired property

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(1) Ante, p. 108.

(2) 25 Q. B. D. 262.

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by his intervention he can sell it and dispose of it in the ordinary way that any one else could, but that does not entitle us to say that the giving of a notice of withdrawal is a form of re-assignment.

Therefore I agree that the learned judge did not correctly deal with this case in the latter part of his judgment, and that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Redpath, Marshall & Holdsworth, for R. F. Payne, Sheffield.*

Solicitors for respondent: *Aldous & Co., for Richardson & Mitchell, Sheffield.*

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HOSACK v. ROBINS.

[1916 H. 1261.]

Emergency Legislation—Mortgage—Charging Order on Shares before War—Assignment after War of Shares subject to Charge—Action against Assignees to enforce Charge by Sale—No Leave obtained—“Sale in lieu of foreclosure”—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14—Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1, sub-s. 1 (b)—Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18), s. 1, sub-s. 1 (b).

In February, 1916, the defendants bought shares subject to a charging order obtained by the plaintiff before the war. On June 27, 1916, the plaintiff, without obtaining leave under the Courts (Emergency Powers) Acts, 1914 to 1916, issued a summons to enforce the charging order against the defendants by sale of the shares:—

Held, that the plaintiff being in the position of a mortgagee under the charging order was really applying for his proper remedy of “sale in lieu of foreclosure,” and as his charging order was before the war, leave was necessary under the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 (b), as amended by the Courts (Emergency Powers) (No. 2) Act, 1916, s. 1, sub-s. 1 (b), although the defendants had only acquired the shares after the war.

D’Auvergne v. Cooper [1899] W. N. 256 commented upon.

Decision of Astbury J., ante, p. 142, affirmed.

APPEAL from a decision of Astbury J. (1)

On April 25, 1913, the plaintiff recovered judgment against

(1) Ante, p. 142.

Shanks for 62*l.* and costs, and on June 13, 1913, he obtained a charging order absolute on Shanks' interest in certain shares in Ayre & Kingcome, Limited. Shanks subsequently became bankrupt, and in February, 1916, the official receiver, who was appointed receiver of the assets, seized and sold the shares to the defendants subject to the charging order.

On June 27, 1916, the plaintiff issued this summons to enforce the charging order against the defendants. He asked for an account of what was due to him from the defendants under the charging order, and that the shares might be sold and the purchase-money lodged in Court subject to further order, and that such further order might be made in the premises as to the Court might seem just.

On October 12, 1916, the Master dismissed the summons on the defendants' preliminary objection that leave to issue it had not been obtained under the Courts (Emergency Powers) Acts, 1914 to 1916.

At the plaintiff's request the summons was then adjourned into Court on this preliminary point.

Astbury J. upheld the preliminary objection and dismissed the summons.

The plaintiff appealed.

Harold Simmons, for the appellant, and

Percy Wheeler, for the respondents, repeated the arguments used by them in the Court below. The following additional case was cited: *In re Anderson & Son, Ltd.* (1)

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J., and it raises a question under the Courts (Emergency Powers) Acts, 1914 to 1916.

The facts in this case are very simple. The plaintiff recovered judgment against one Shanks in April, 1913,—that is, before the war—and he obtained a charging order in June, 1913, upon certain shares in a limited company. Shanks became bankrupt, and all we really know about the subsequent proceedings is that the trustee in bankruptcy, or the official receiver acting, I suppose, as the

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trustee in bankruptcy, sold the shares, subject to the plaintiff's charge. That being so, the plaintiff says: "I have a charging order on these shares, and, subject to my charging order, they are now vested in the defendants," and he takes out an originating summons asking for the sale of the shares and proper mortgagee's accounts. The defendants then say: "You cannot proceed; you ought to have got leave to commence these proceedings." That question turns really upon two or three sections of the Courts (Emergency Powers) Act of 1914 and the amending Act of 1916. (1) Now s. 1, sub-s. 1 (b), of the Act of 1914 says this: [His Lordship read the sub-section and

(1) Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), s. 1: "(1.) From and after the passing of this Act no person shall . . .

"(b) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security (except by way of sale by a mortgagee in possession), forfeit any deposit, or enforce the lapse of any policy of insurance to which this subsection applies, for the purpose of enforcing the payment or recovery of any sum of money to which this subsection applies, or, in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided for by rules or directions under this Act.

"This subsection shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the

fourth day of August nineteen hundred and fourteen . . .

"(2.) If, on any such application, the Court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the present war, the Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, stay execution or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the Court thinks fit."

Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18), s. 1: "(1.) In subsection (1.) of section one of the Courts (Emergency Powers) Act, 1914 (hereinafter referred to as the principal Act) . . .

"(b) the provisions relating to foreclosure shall extend to the institution of proceedings for foreclosure or for sale in lieu of foreclosure"

continued:] That sub-section says that no person shall foreclose or realize any security for the purpose of enforcing the payment or recovery of any sum of money to which the section applies without the leave of the Court. It was held by Warrington J., as he then was, in *In re Farnol Eades Irvine & Co.* (1) that that sub-section did not prevent a mortgagee from commencing proceedings for foreclosure, although it did prevent him from obtaining foreclosure absolute. It was thought by Parliament that that was not a convenient decision, and accordingly the amending Act of 1916 was passed, which by s. 1, sub-s. 1 (b), enacts that the provisions relating to foreclosure in s. 1, sub-s. 1, of the Act of 1914 shall extend to "the institution of proceedings for foreclosure or for sale in lieu of foreclosure"; that is to say, a mortgagee cannot take the first step which in the ordinary course would end either in foreclosure absolute or in an order for sale without applying to the Courts. The provision does not apply, of course, to a mortgage or charge created after the war. That goes without saying. But then it is said that there are several reasons why this is a case in which this Act ought not to apply. In the first place, it is contended that a charging order is a peculiar sort of charge, as to which the customary remedy—I say advisedly "customary remedy"—is by sale and not by foreclosure. I do not read the words "the institution of proceedings for foreclosure or for sale in lieu of foreclosure" as creating any difficulty at all. They are both remedies having the same object, the realization of the security. I think that there is no good ground for saying that these words contemplate and deal only with a case in which the mortgagee—the person having the charge—can say that he has a right or option to apply for and get either foreclosure or sale. I do not think there is any such distinction. I have regard to the fact that under comparatively modern legislation—under s. 25, sub-s. 2, of the Conveyancing Act, 1881—in any foreclosure action the Court has now full jurisdiction to order a sale. It orders it upon terms with which I do not now concern myself, but it has full power to order a sale whenever it thinks fit, and on such terms as it thinks fit, such as the deposit in Court of a sum to cover the costs of sale and various things

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of that kind. The Court treats these two proceedings as almost interchangeable.

Now it is not necessary to decide this point, but I regard the view taken by North J. long ago in the case of *D'Auvergne v. Cooper* (1) that sale and not foreclosure was the proper remedy of a person having a charge under s. 14 of the Judgments Act, 1838, as merely a rule of practice, and not a question of jurisdiction. As a matter of convenience the Court says that the charge shall be enforced not by foreclosure but by sale. I guard myself from saying there is any real prohibition which could prevent the Court, if it thought fit, from granting either foreclosure or a sale in lieu of foreclosure. If the Court did grant foreclosure, it could at once, under the statute referred to, make an order for sale instead of for foreclosure. But then the plaintiff says that the Court can only stay execution if the person liable to make the payment is unable immediately to make the payment by reason of circumstances attributable directly or indirectly to the present war, as is provided by sub-s. 2 of s. 1 of the Act of 1914, and that there are no such circumstances in the present case. And he also points out that sub-s. 1 of s. 1 of the Act of 1914 is not to apply to any sum of money "due and payable in pursuance of a contract made after the beginning of the 4th day of August, 1914," and that the sub-section is not therefore applicable, as his right to sue the present defendants accrued after that date, because it arose upon the sale by Shanks' trustee in bankruptcy, which was after that date. Now I think that is a fallacy. The right of the plaintiff does not arise under a contract with the defendants at all. In many mortgages there is no contract to pay at all. Sometimes a contract is expressly excluded by the terms of the deed, as where trustees make a mortgage amongst themselves. There are many other cases. Take for example the case of a will where an estate is devised subject to large charges in favour of younger children. There is no contract to pay those at all. Nobody is liable to pay the mortgage debt. In each of these cases there is a positive prohibition from commencing proceedings without an application having first been made to the Court. Such an application may create some delay and may occasion some slight expense, but we cannot help that. It is our duty to administer the law as

we find it, and I think Astbury J. in the Court below took a correct view of this case.

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WARRINGTON L.J. I am of the same opinion. In the year 1913 the plaintiff obtained a charging order upon certain shares in a limited company belonging to a man named Shanks, against whom he recovered judgment, and the effect of such an order, as has been often pointed out, is that it confers on the holder of it such rights and remedies as he would have had if the charge had been created by contract between himself and the owner of the property charged.

In that state of things war broke out on August 4, 1914. In February of 1916 the trustee in bankruptcy of Shanks sold the shares to the defendants. The defendants were therefore never personally liable to pay the judgment debt, but they held the property which was charged with the amount of it, just in the same way as the purchaser of an equity of redemption may hold the property which he purchases subject to the mortgage debt. On June 27, 1916, the plaintiff issued an originating summons for the realization of his security by sale. He did not previously issue the necessary summons under the Courts (Emergency Powers) Acts. Objection was taken before Astbury J. on that ground, and the learned judge held that the plaintiff was not justified in issuing the originating summons, and he dismissed it. This appeal is from that decision.

The necessity of issuing the preliminary summons is imposed by s. 1 of the Courts (Emergency Powers) Act, 1914, as amended by s. 1 of the Courts (Emergency Powers) (No. 2) Act, 1916. I propose to read the material parts of s. 1, sub-s. 1 (b), of the Act of 1914 as amended by s. 1, sub-s. 1 (b), of the Act of 1916. They are as follows: "From and after the passing of this Act no person shall institute any proceedings for foreclosure or for sale in lieu of foreclosure, exercise any right of re-entry, or realise any security for the purpose of enforcing the payment or recovery of any sum of money, or in default of the payment or recovery of any such sum of money, except after such application to such Court and such notice as may be provided" and so on. All that you have to ascertain then in order to see whether that Act applies is, first, are the proceedings in question for foreclosure or for sale in lieu of foreclosure? Secondly, are they for the purpose of the

C A. recovery of any sum of money to which the sub-section applies,
1917 or for the remedy of foreclosure in default of payment of any such
HOSACK sum of money? With regard to the first of those questions, I
v. think the true meaning of the provision with regard to foreclosure
ROBINS. or sale in lieu of foreclosure is that no person shall institute any
Warrington L.J. proceeding for the purpose of realizing the security which will
result in foreclosure or in the analogous benefit of sale, which in
some cases takes the place of foreclosure. I do not think that the
provision is confined to cases in which the proceedings are in terms
for foreclosure or for sale in lieu of foreclosure, or that it is limited
to those cases in which the Court, if asked to do so, would decree
a foreclosure. I think it extends to the cases also where the ordinary
practice of the Court is rather for convenience than otherwise to
direct a sale instead of directing foreclosure. It seems to me that
these proceedings therefore come within the description of pro-
ceedings which are not to be instituted except after making the
preliminary application. Then, of course, it is clear they are brought
for the purpose of obtaining the relief sought in default of the
payment of money, to which s. 1, sub-s. 1 (b), of the Act of 1914
applies, so they come within that part of it, unless there is some-
thing in the Act which takes this money out of the category of
moneys to which this section applies.

The only provision which can be relied upon for that purpose is
that contained in the subsequent words of this same sub-section:
“This subsection shall not apply to any sum of money (other than
rent not being rent at or exceeding fifty pounds per annum) due
and payable in pursuance of a contract made after the beginning
of the 4th day of August, 1914.”

I ask myself, Is this a sum of money due and payable in
pursuance of a contract made after the 4th day of August, 1914?
The liability to pay this money arises out of the judgment which
was obtained in the year 1913. The charge upon the shares was
originated by the charging order, which was made in June, 1913.
There is no contract between the plaintiff and the defendants, the
present holders of these shares, under which the money becomes
recoverable, and it seems to me, therefore, that this particular sum
of money is one to which s. 1, sub-s. 1 (b), of the Act of 1914, as
amended by s. 1, sub-s. 1 (b), of the Act of 1916, applies, and that

the originating summons could not properly be issued without the preliminary summons under the Acts.

LAWRENCE J. I am of the same opinion, and have nothing to add to the judgments which have been delivered by the Master of the Rolls and Warrington L.J.

LORD COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors: *Sutton, Ommanney & Rendall; Clowes, Hickley & Steward.*

W. I. C.

In re FLETCHER.

READING *v.* FLETCHER.

[1916 F. 236.]

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Jan. 29, 30 ;
Feb. 8.

Merger—Intention—Interest—Subsequent Dealings—Evidence.

Two properties A and B having been included in one lease at a low ground rent and subsequently separately assigned by the lessees, the reversioners in fee took an assignment of property A and four other leasehold properties for the residue of the respective terms.

There was no direct evidence that they then had any intention against merger.

About nine months later the reversioners by a mortgage, which recited that the term in property A and the reversion in fee subject to the term were vested in them as tenants in common, mortgaged the term and the entire reversion separately :—

Held, that, having regard to the form of the mortgage and the covenants for title therein contained, the mortgage was admissible as evidence not only that the reversioners then believed that there was no merger, but that such was their intention at the time when they took the assignment of the term.

Held, therefore, on the construction of the assignment and the mortgage, that the term had not merged.

Decision of Astbury J., ante, p. 147, reversed.

APPEAL from a decision of Astbury J. (1)

The facts are fully stated in the report of the case in the Court below and were shortly as follows :—

By a lease of 1851 a piece of land was demised to the lessee for

(1) Ante, p. 147.

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C. A. ninety-six years, at a rent of 4*l.* 0*s.* 8*d.*, the lessee being authorized
1917 to build a house on any part of the land on paying an additional
FLETCHER, rent for the site. In 1861 the lessee built Parkhurst on part of the
In re. land, and the additional site rent was fixed at 2*l.* 10*s.* The rest of
READING the land was garden ground. In 1865 the lessee's executors assigned
v. Parkhurst and the garden plot separately to Reading and Spencer.
FLETCHER. Reading covenanted with the assignors to pay the entire rent of
6*l.* 10*s.* 8*d.* for the residue of the term. He also joined in the assign-
ment to Spencer, and covenanted with him to pay the entire rent.
Parkhurst subsequently became vested in Reading's daughter-in-
law, Hannah Reading, who died on October 16, 1913, having by
her will of September 20, 1913, devised and bequeathed her residuary
estate (which included Parkhurst) to her executors and trustees,
namely, Holland and her son (the plaintiff) and her son-in-law (the
defendant), upon trust for sale, the proceeds to be divided between
her daughters Emily Fletcher (the defendant's wife) and Edith
Reading. On January 27, 1914, the freehold reversion in all the
premises demised by the lease was conveyed to the two daughters
as tenants in common in fee simple, subject to and with the
benefit of the lease. On December 3, 1914, Parkhurst and four
other leasehold properties were assigned by Hannah Reading's
executors to the residuary legatees, Emily Fletcher and Edith
Reading, as tenants in common for the residue of the respective
terms, each residuary legatee covenanting as to one half of the
premises to indemnify the executors against the respective rents
and covenants. By a mortgage of October 7, 1915, reciting the
lease of 1851, the erection of Parkhurst at the additional rent,
the assignment of Parkhurst to Reading at the entire rent of
6*l.* 10*s.* 8*d.*, and that Parkhurst was now vested in the daughters
at that rent for the residue of the term, and reciting the convey-
ance of the freehold reversion of the entire lease to the daughters,
the daughters assigned Parkhurst to the mortgagee for the residue
of the term and conveyed the freehold reversion in the entire
property to the mortgagee in fee simple, subject to and with the
benefit of the lease by way of mortgage for securing a loan of
300*l.* On November 27, 1915, Emily Fletcher died intestate and
without having had any children, and on January 21, 1916, the
defendant her husband took out letters of administration. The

plaintiff, as heir-at-law of his sister, Emily Fletcher, claimed Parkhurst on the footing that the lease had merged pro tanto, and on March 3, 1916, he issued a writ for a declaration and ancillary relief.

Astbury J. held that, in the absence of any proof that it was the reversioners' interest or duty to keep the term alive at the date of the assignment, the subsequent mortgage was irrelevant as to their intention at that previous date, and that the term had therefore merged.

The defendant appealed.

Micklem, K.C., and *Johnston Edwards*, for the appellant, and *Hon. Frank Russell, K.C.*, and *Christopher Farwell*, for the respondent, repeated the arguments used by them in the Court below, except that counsel for the appellant abandoned their contention that there was any duty on the part of Emily Fletcher and Edith Reading to prevent merger.

Cur. adv. vult.

Feb. 8. LORD COZENS-HARDY M.R. read the following judgment : This appeal raises a curious question on the law of merger, a leasehold interest and the freehold reversion having become vested in the same person. The plaintiff as heir-at-law of Emily Fletcher claims the absolute freehold in possession, while the defendant as her administrator claims that there was no merger of the leasehold interest. Astbury J. has decided in favour of the heir-at-law.

By s. 25, sub-s. 4, of the Judicature Act, 1873, it was enacted that "There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

A Court of Equity had regard to the intention of the parties and to the duty of the parties. In the absence of direct evidence of intention, the Court presumed that merger was not intended if it was to the interest of the party, or only consistent with his duty, that merger should not take place : see *Capital and Counties Bank v. Rhodes*. (1) But it was not the law of the Courts of Equity that

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merger took place only if an intention could be established that it should take place. The common law doctrines prevailed if nothing more was known. Intention might be established by means of an expressed intention at the time. The declaration of intention might be verbal. If not substantially at the time, what would be the effect of a declaration made some time afterwards, say twelve months afterwards? Such a declaration could not be rejected as inadmissible, though its weight might be slight. It is constant practice, particularly in criminal cases, to prove intention at a particular time by words or acts at a subsequent date: see *Doe v. Allen* (1); *Lea v. Thursby* (2); Taylor on Evidence, 10th ed. p. 867, s. 1209.

The material facts are as follows: In 1851 a lease for ninety-six years was granted of some land on part of which a house called Parkhurst was built in 1861. The lessee died in 1863, and his executors in 1865 sold Parkhurst, but not the rest of the demised land, to John Reading for the remainder of the term of ninety-six years, the entire rent being by contract thrown upon the house. John Reading died in 1886. This leasehold house became vested in Hannah Reading, who died in 1913. In January, 1914, the reversion in fee simple, subject to the lease of 1851, was conveyed to Emily Fletcher and Edith Reading, daughters of Hannah Reading, their heirs and assigns, as tenants in common. In December, 1914, the executors and trustees of the will of Hannah Reading assigned the leasehold house to Emily Fletcher and Edith Reading, who were residuary legatees under the will of Hannah Reading, as tenants in common for the residue of the term. This effected at law a merger. By a deed dated October 7, 1915, and made between Emily Fletcher and Edith Reading, mortgagors, of the first part, Thomas Fletcher of the second part, and Mrs. Holland, mortgagee, of the third part, reciting that the leasehold premises were then vested in the mortgagors as tenants in common for the residue of the term, and reciting the conveyance of January 27, 1914, the mortgagors as beneficial owners assigned the leasehold premises to the mortgagee for the residue of the term of years and conveyed the property comprised in the conveyance of January 27, 1914, subject to the lease to the mortgagee in fee simple by way of mortgage. Emily Fletcher died in November, 1915, intestate and without

(1) (1840) 12 Ad. & E. 451.

(2) [1904] 2 Ch. 57.

issue. The plaintiff, her brother, is her heir-at-law. The defendant, her husband, is her administrator. There is no evidence of any intention expressed in December, 1914. It was not contended in this Court that there was any duty to prevent merger, and I can see no interest to prevent merger. But in October, 1915, the co-owners expressly recited that (1.) the lease and (2.) the reversion in fee subject to the lease were vested in them as tenants in common, and they mortgaged them as separate properties. What is the effect of this? Of course these two ladies were innocent of any knowledge of the law of merger, and in truth they had no intention either for or against merger. But, having regard to the form of the mortgage and the covenants for title therein contained, I think the mortgage is admissible as evidence not only that they then believed there was no merger, but that such was their intention in the previous December. There is no other evidence either way.

In these circumstances, with great respect to Astbury J., I think the appeal must be allowed in terms of the notice of appeal.

WARRINGTON L.J. read the following judgment :—Emily Fletcher died on November 27, 1915, intestate. The plaintiff is her heir-at-law. The defendant is her husband and legal personal representative. At the time of her death she and her sister Edith Reading were entitled to a house and land called Parkhurst, situate at Harborne, near Birmingham, for an estate in fee simple in equal shares as tenants in common. The plaintiff claims to be entitled to the house as heir-at-law. The defendant asserts that at the death of Emily Fletcher there was subsisting a term of years in the premises which term was vested in Emily Fletcher and Edith Reading in equal shares as tenants in common, and that he is entitled to one moiety of the premises for the remainder of the term. The plaintiff, on the other hand, contends that the term has merged in the inheritance. Whether it has so merged is the question to be determined. Astbury J. has decided this question in the affirmative.

By the Judicature Act, 1873, s. 25, sub-s. 4, it is enacted that there shall not after the commencement of the Act be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

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C. A. Accordingly the question is, would a Court of Equity, in the circum-
 1917 stances of this case, have held that the term was merged or
 FLETCHER, extinguished in the freehold?
In re. The principle on which Courts of Equity acted is thus stated by
 READING Cozens-Hardy L.J. in *Capital and Counties Bank v. Rhodes* (1):
 v. FLETCHER. "They had regard to the intention of the parties, and, in the absence
 Warrington L.J. of any direct evidence of intention, they presumed that merger
 was not intended, if it was to the interest of the party, or only
 consistent with the duty of the party, that merger should not take
 place."

The circumstances of the present case are as follows: By a lease dated February 15, 1851, one Simcox granted to one Singleton a lease of 3904 square yards of land at Harborne for a term of ninety-six years from March 25, 1850. A house called Parkhurst was afterwards built, and with its outbuildings, garden, and so forth occupied 1820 square yards. The remaining land remained agricultural or garden ground. In 1865 Singleton's executors sold the 1820 square yards on which Parkhurst was standing to John Reading and the remainder to one Spencer, and it was agreed that the entire rent under the lease should be paid by the owners of the Parkhurst plot in relief of the remainder. The lease of Parkhurst was afterwards bought from John Reading's executors by Hannah Reading. She died on October 16, 1913, having made her will dated September 20, 1913, by which she bequeathed her general estate, including the leasehold interest in Parkhurst, to her trustees in trust for sale, with a direction that they should hold the net proceeds in trust for her daughters Emily Fletcher and Edith Reading in equal shares. On January 27, 1914, Parkhurst, subject to the lease, was conveyed to Emily Fletcher and Edith Reading in fee simple in equal shares as tenants in common. There was evidence that the purchase of the reversion the contract for which was made on October 23, 1913, one week after their mother's death, was made with the view of giving effect to an expressed wish of hers "to make Parkhurst a freehold." At the time it was made, however, and indeed at the date of the conveyance, the two purchasers were not entitled in specie to the leasehold interest and might never have become so entitled. Subsequently, however,

by a deed dated December 3, 1914, the outstanding estate of Hannah Reading, including the leasehold interest in Parkhurst, was transferred and assigned to Emily Fletcher and Edith Reading in equal shares.

It is as the result of the execution of this deed that the term is said to have been merged in the freehold then already vested in the two ladies, and it is therefore necessary to examine it somewhat carefully in order to ascertain whether merger is consistent with the intention of the parties as thereby indicated. I may say at once that the defendant has failed to satisfy me that there was any interest, and he has not contended that there was any duty from which an intention to avoid merger can be presumed, and we have therefore to infer intention from the words and acts of the two ladies.

The deed of December 3, 1914, after stating the effect of the will of Hannah Reading and mentioning her death and the probate of her will and stating that the executors had paid her debts and so forth except certain specified liabilities, leaving a balance for distribution, and that their accounts had been approved, contains the following material recitals: "And whereas the residuary legatees as the only persons beneficially entitled to the testatrix's residuary estate have agreed that the whole thereof shall be appropriated and conveyed to them in satisfaction of their respective shares of such residuary estate: And whereas the aforesaid items of personalty set out in the second schedule hereto have been transferred and paid respectively by the executors to the residuary legatees at the request of the latter:" The deed then proceeds as follows: "Now this indenture witnesseth that in pursuance of the aforesaid agreement and in consideration of the premises the executors by the direction of the residuary legatees do hereby as personal representatives and trustees of the said Hannah Reading deceased assign and convey unto the residuary legatees all and singular the leasehold hereditaments and premises comprised in the leases bearing the dates and made between the parties stated in the first second and third columns of the first schedule hereto To hold the said hereditaments and premises (short particulars whereof are set forth in the fourth column of the said first schedule) Unto the residuary legatees their executors administrators and assigns

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 1917 expired of the respective terms of years set forth in the fifth column
 FLETCHER, of the said schedule subject to the payment of the respective yearly
In re. rents set forth in the sixth column thereof and subject also to the
 READING respective covenants on the part of the lessées and conditions in
v. the aforesaid respective indentures of lease contained and to the
 FLETCHER. subsisting underleases or tenancies of the said respective heredita-
 Warrington L.J. ments and premises And each of them the residuary legatees so
 as to be liable only in respect of one equal undivided half share of
 the said premises doth hereby for herself and her assigns covenant
 with the executors that they the residuary legatees their executors
 administrators or assigns will henceforth during the continuance
 of the said respective terms pay the said respective rents reserved
 by and perform and observe the covenants on the parts of the
 respective lessees and the conditions in the said respective indentures
 of lease and therefrom and from all claims and demands thereunder
 will save harmless and keep indemnified the executors as such
 personal representatives as aforesaid their executors and adminis-
 trators and the estate and effects of the said Hannah Reading
 deceased." The deed then contains a release in ordinary form of
 the executors and trustees with a covenant to indemnify them
 against the specified liabilities and all other liabilities, if any, of
 the estate.

The first schedule contains the particulars of several leases, including that of February 15, 1851, but it does not note the fact that part only of the property comprised in that lease was vested in the testatrix.

I think this deed does show an intention to keep the terms alive. It contains no reference to the fact that the two ladies were the owners of the reversion. It places the lease of Parkhurst in the same category and subject to the same provisions as the other leases which would of course remain subsisting, and in particular the two ladies covenant to pay the rent and to observe the covenants, which would be meaningless if the term was to determine. The fact that other property was comprised in the lease seems to me to be immaterial on this point, inasmuch as the executors and trustees would be under no liability to perform the covenants in respect of this other property.

I think the deed contemplates the continuance of the leasehold interest after its execution, and in my judgment this is sufficient.

The expressions of intention relied on by the learned judge are not, in my opinion, sufficient to outweigh the indications contained in the deed. In the first place the words used are ambiguous and do not necessarily mean that the interest in the house is to be at once converted into an estate in fee simple in possession; and in the second place, even if they were clearer than they are, they would only express the intention at the time they were spoken, and the deed may express a different intention formed on riper consideration and advice. But if there were any doubt the case is, in my opinion, made quite clear by the following fact: On October 7, 1915, the two ladies executed a mortgage of Parkhurst of which it is enough to say that it clearly treats the leasehold interest and the freehold reversion as separate items of property.

The learned judge appears to have thought that a declaration of what was the intention at the date of the alleged merger made at a subsequent time would be inadmissible. But in my opinion this would not be so. In Taylor on Evidence, 10th ed. p. 867, s. 1209, the law is stated as follows: "Where declarations of intention are receivable in evidence, their admissibility appears not to depend upon the *time* when they were made. Certainly, *contemporaneous* declarations will, *caeteris paribus*, be entitled to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them, unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by an instrument, were simply to refer to what he intended to do, or wished to be done at the time of speaking." And see *Doe v. Allen*. (1)

The deed is clearly a declaration that in fact the terms had not merged, but if so that was only because the declarants so intended at the time of the previous assignment. The deed really, therefore, declares that it was their intention that merger should not take place.

As to the weight of such a declaration, I see no reason why it should not be sufficient.

On the whole, therefore, I am of opinion that the order of the

(1) 12 Ad. & E. 451.

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C. A.

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FLETCHER,
In re.

READING
v.

FLETCHER.

Warrington L.J

C. A. learned judge was incorrect and ought to be discharged, and a
1917 declaration made as asked by the notice of appeal.

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LAWRENCE J. read the following judgment :—This case raises a question as to the application of the doctrine of the merger of a leasehold interest in the fee. There is little or no difference between the parties as to the principles to be applied ; both sides recognize that they are correctly stated by the present Master of the Rolls in his judgment in *Capital and Counties Bank v. Rhodes*. (1) The parties differ as to the application of these principles to the facts of this case.

It is not disputed that an intention not to merge by the person acquiring the outstanding estate will prevent merger and will preserve the two estates as separate interests in the property. The intention not to merge will be presumed when it can be shown that it is either the duty or the interest of that person that there should be no merger. In these cases an intention to do his duty or to take the course which is most in his interest is presumed, but evidence of intention is not restricted to these cases ; intention is a question of fact, and, like any other question of fact, it can be proved by any admissible evidence.

It is quite true, as pointed out by the learned judge, that the point of time at which the intention is material is that at which the interest is got in—in this case December 3, 1914, when the leasehold interest in Parkhurst was assigned to Edith Reading and Emily Fletcher. Merger takes place, if at all, by operation of law upon the two estates becoming vested in the same persons. The evidence of what they intended at that moment is not limited to what they said or did in executing the deed. The cogency of the evidence must always depend upon a variety of considerations, and remoteness, whether in time or any other respect, may weaken or even destroy the effect of particular pieces of evidence. In this case it was said that there was both a duty and an interest to preserve the leasehold. The duty was not insisted upon, the interest was. The inference from duty not being insisted upon in this Court, Mr. Russell, for the respondent, did not argue it, and I therefore lay it aside as a ground of decision, but in doing so I must not be

(1) [1903] 1 Ch. 652, 653.

taken to think that there was no duty. I am inclined to think, without having heard arguments upon the point, that there was a duty to keep the two estates alive. The owner of the leasehold interest in the garden plot is entitled to the benefits of the covenants contained in the lease of 1851 and of those in the assignment to Spencer on October 30, 1865. There is no privity of contract between the present holder of the garden plot and the present owners of Parkhurst, and the privity of estate which supports these covenants is the leasehold interest in Parkhurst.

At common law a surrender was not allowed to destroy the rights of strangers thereto—"the estate surrendered hath in consideration of law a continuance": Co. Litt. 338b; and it would seem strange to me at first sight that equity should not recognize the duty to intend that which would produce the like result. The fact that the common law does itself protect the third party is not an answer to this; for equity does not invariably decline to follow the law, but only (as a rule) where there is something that can be said to be inequitable in doing so.

I do not think the case for presuming intention from interest at all a strong one, but I cannot say that there is none. I think that if the evidence as to the "reversion duty" had been fully and clearly developed it would probably have shown sufficient interest to prevent merger. I find it very difficult to imagine a case in which it is to the interest of a person to make a payment of reversion duty earlier than she need do so, and when there are two persons concerned the case becomes more difficult. If one assumes that the discount is ample and the money available, it is still, generally speaking, more advantageous to have it at command than to part with it.

I turn now to the other evidence of intention in the case. Astbury J. appears to have been influenced by the evidence of conversations during the illness of Hannah Reading. These conversations do not seem to me to have any real bearing upon the question of merger—they show a clear desire to acquire a freehold interest in Parkhurst; this was done, but not with any intention to merge the leasehold interest. The solicitor who received the instructions does not seem to have had knowledge of an intention to merge, and the daughters could not have intended

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merger, for they used the same expression and said they "had made Parkhurst a freehold" when they had acquired the fee, although there was then no merger. The explanation why their father desired their mother to acquire the freehold, namely, that in performing the covenants to repair she would be spending the money upon her own freehold rather than upon the lessor's, is a perfectly sound business reason and has nothing to do with tenure. The assignment of December 3, 1914, seems to negative any intention to merge. If merger had been contemplated I should have expected words indicating that the covenants with regard to the garden plot were to be observed "notwithstanding the merger hereby effected," or some provision of that sort; it may be that it is not necessary, but a cautious person contemplating merger would, I think, provide against any possible effect therefrom.

The substantial point upon which I think the learned judge has allowed himself to be misled is that he did not give due weight to the mortgage of October, 1915. He seems to have thought that because this mortgage was made ten months after the leasehold was acquired it could not show the intention of the parties as to merger at the date when it was acquired. This, I think, is a mistake. The statement by the ladies in the mortgage deed that the leasehold interest in the premises was then vested in them for the residue of the term would have been inaccurate if there had been a merger, and would have been inexcusably untrue if they had themselves intended that a merger should take place only ten months before. In fact, of course they knew nothing about merger; but this only places the blame on to the shoulders of their legal adviser. I think the true inference to be drawn from the evidence is that the parties by their legal adviser did intend that there should be no merger of the lease.

The appeal, therefore, must be allowed.

Solicitors: *H. G. Kenyon, for Wallace Robinson & Morgan, Birmingham; Chamberlain, Johnson & Levy, for Chamberlain & Johnson, Llandudno.*

W. I. C.

In re EYRE.
JOHNSON v. WILLIAMS.

[1915 E. 100.]

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Jan. 23, 24;
Feb. 8.

*Will — Construction — Contingent Bequest — Leasehold — Destination of
Profits till vesting.*

Contingent bequest of leasehold, neither vested in trustees nor preceded by a vested limited interest, with gift over:—

Held, not to carry intermediate rents and profits, which fell into residue.

Semble, a contingent legacy is segregated, so as to carry interim income, by being subject to a prior vested limited interest.

The rule that a contingent legacy by a parent to a child carries interest during suspense of vesting does not apply where the parent is the mother unless she is actually standing in loco parentis to the legatee.

By her will, dated October 24, 1911, Emily Frances Eyre, widow, after appointing Minnie Williams, Harriett Johnson, and George Hope Newborn her joint executors, made the following specific gift: "I give devise and bequeath my residence known as 'Beechfield' aforesaid unto my daughter Ellen Emily Mary Catherine Eyre if she shall survive me and live to attain the age of twenty-one years or marry under that age for her own absolute use and benefit but in case my said daughter shall die in my lifetime or shall not attain the age of twenty-one years or marry under that age then I give devise and bequeath my said residence to the said Minnie Williams for her own absolute use and benefit"; and, after making sundry specific and pecuniary legacies of considerable amount, the testatrix gave and bequeathed all the residue of her estate to M. Williams, H. Johnson, and G. H. Newborn in equal shares. She died on July 27, 1913. At the time of her death her daughter, the infant defendant, was about eleven years of age. "Beechfield," a villa at Bournemouth of considerable size standing in its own grounds, was held by the testatrix on a long lease of ninety-nine years from September 29, 1890, at a ground rent of eighteen guineas a year. The house had been purchased by her in 1911 for 3000*l*. Her husband had died intestate

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in her lifetime possessed of a very considerable estate, and the infant defendant was the only child of the marriage. At the time of the testatrix's death the defendant Stanilaus Thomas Eyre, an uncle of the infant, was, under an appointment of the Court, the infant's guardian. She was being maintained out of the income of the property to which she was entitled under the intestacy of her father, and was being educated at a convent school at St. Leonard's-on-Sea, and not residing with the testatrix. The plaintiffs, the two executors other than M. Williams, took out a summons to determine whether, till the contingent gift of "Beechfield" became vested, the rents, profits, and income fell into residue or to whom they belonged.

Johnston Edwards, for the plaintiffs.

H. Terrell, K.C., and *H. B. Vaisey*, for residuary legatees. The rule is that where a legacy depends on a contingency the intermediate interest falls into residue. *Shawe v. Cunliffe* (1) is the foundation of the rule. That absolute rule has since been modified, e.g. in the case of a specific legacy immediately vested with enjoyment deferred: *Guthrie v. Walrond* (2); or where the legacy is segregated or vested in trustees for the benefit of the object of the gift when the contingency happens: *In re Clements* (3); *In re Woodin*. (4) Segregation means vesting in trustees.

[YOUNGER J. "Or is otherwise directed to be set apart": *Theobald on Wills*, 7th ed. p. 181.]

The rule laid down in *In re Woodin* (4) is very emphatic and clear. To have segregation there must be a vesting in some one. The mere fact that a legacy is specific is not sufficient for segregation. It may be illogical, but is the result of the authorities. Moreover, here there is a specific gift to residue till the contingency happens. The executors are receiving the interest qua residue, and so long as that continues there is no segregation. It may be said that, this being a gift by a mother to a child, it was intended as an immediate gift which would be required for the infant's maintenance. But to justify that contention it must be shown that the income is really required for maintenance, as it is making a new will for

(1) (1792) 4 Bro. C. C. 144.

(2) (1883) 22 Ch. D. 573.

(3) [1894] 1 Ch. 665.

(4) [1895] 2 Ch. 309.

the testatrix. But it is not here required. The presumption of maintenance is applicable in the case of a gift by a father or a person in loco parentis, but not of a gift by a mother unless she has put herself in loco parentis: *Simpson on Infants*, 3rd ed. p. 229; *Powys v. Mansfield* (1); *Douglas v. Andrews*. (2) There is no obligation on the mother to maintain the infant. In this case there is a negation of any possibility of her being in loco parentis. Where the Court allows maintenance, it only gives it out of the income and does not give the income to the infant: *In re Bowlby*. (3) [They also referred to *In re George* (4) and *In re Dickson*. (5)]

Clauson, K.C., and *W. R. Sheldon*, for the infant. The question is merely one of construction. It is not a principle of law, but a statement of construction, that a contingent legacy carries the income where it is given to trustees or otherwise set apart from the testator's estate: *Theobald on Wills*, 7th ed. p. 181. There is no magic in segregation; the mode of segregating is immaterial. The idea originated with *Boddy v. Dawes* (6) and *Dundas v. Wolfe Murray*. (7) "In the case of leaseholds a specific contingent gift given directly without the medium of a trust is probably a sufficient segregation" to bring the case within the rule: *Theobald on Wills*, 7th ed. p. 181; *Kiersey v. Flahavan*. (8) On the construction of this will "Beechfield" means "Beechfield" and everything that has accrued to it since the testatrix's death. Residue was not intended to have anything to do with it. But if the intermediate income falls into residue, yet the infant is entitled to maintenance out of it, because the testatrix treated herself as in loco parentis and always resented and struggled against the custody being taken from her and given to the uncle. The moral obligation of the mother to maintain her child is the same as the father's. The obligation to support is generally spoken of as that of the "parent," which applies to both parents indifferently. Where there are more funds than one liable, maintenance may be given from either as is most in the infant's interest:

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(1) (1837) 3 My. & Cr. 359.

(2) (1849) 12 Beav. 310.

(3) [1904] 2 Ch. 685.

(4) (1877) 5 Ch. D. 837.

(5) (1885) 29 Ch. D. 331.

(6) (1836) 1 Keen, 362.

(7) (1863) 1 H. & M. 425.

(8) [1905] 1 I. R. 45.

YOUNGER Simpson on Infants, 3rd ed. p. 263; *Lucas v. King* (1); *In re Wells*. (2)

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Cur. adv. vult.

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Feb. 8. YOUNGER J., after stating the facts and adding that he had no doubt the bequest was a beneficial one and that it could not have been said of the testatrix at her death that, though the mother of the infant, she was standing in loco parentis, continued: In these circumstances the question I have now to determine is to whom, so long as the child is living and is still under age and unmarried, the rents, profits and income of "Beechfield" belong. The principles which govern the question whether a contingent legacy does or does not before it vests carry interest or, in the case of chattels real, rents and profits were thoroughly explored in the interesting arguments of counsel, and in the result I think that this point as it emerges in the present case is fully covered by authority.

Prima facie a contingent legacy does not carry interest while it is in suspense. If, however, a testator has directed the legacy to be immediately set apart for the benefit of the objects of the gift as soon as the contingency which he has indicated happens, then when the contingency does happen the fund set apart with all its accretions belongs to the contingent legatees: see *In re Medlock*. (3)

But the direction for segregation must be contained in the will itself. There is no setting apart within the meaning of the rule if executors, without any such direction and merely as an arrangement for the more convenient administration of the estate, themselves effect the segregation: *In re Dickson*. (4)

Moreover, a specific bequest of such a character as the bequest in the present case is not by reason only of its specific character segregated from the mass of the testator's estate within the meaning of this rule. In the case of a leasehold house like this the question whether the rents and profits go to the contingent legatee while the bequest is still in suspense depends upon the same considerations as those which regulate the rights of a contingent legatee of a pecuniary legacy not directed by the will to be set apart for his benefit. "I think," says Fry J. in *Guthrie v. Walrond* (5), "the law is plain that

(1) (1863) 11 W. R. 818.

(3) (1886) 55 L. J. (Ch.) 738.

(2) (1889) 43 Ch. D. 281.

(4) 29 Ch. D. 331, 334.

(5) 22 Ch. D. 573, 578.

when a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to his next of kin, as the case may be." Accordingly in that case, in which as in the present not only was the enjoyment of the specific property postponed but the vesting itself was contingent, the learned judge held that the interim income fell into residue. The statement of Sir Andrew Porter M.R. in *Kiersey v. Flahavan* (1),—that "the gift is a segregation in itself, and the subject of it is not mixed up with the general residue until the gift fails to take effect"—if it is to be treated as a statement of general application, is not, I think, supported by English authority.

Now segregation sufficient for the purpose in hand may, as in *In re Clements* (2), be effected by a direction in a will that the fund shall be vested in trustees for the benefit of the contingent legatee, or possibly it may even be sufficiently evidenced by a form of gift under which the specific property to which the contingency applies has been previously made the subject of a vested limited interest prior in enjoyment to the interest which is contingent, as, for instance, an interest for life: see *Kiersey v. Flahavan* (1), to which I have already referred. But I have found no case in which such a segregation has been held to be effected where the contingent interest is that of the first taker and there has been no immediate bequest of the property to trustees for his or her benefit. And, no doubt because he felt pressed by that difficulty, Mr. Clauson, on behalf of the infant, contended that in the present case the true effect and purport of the gift, as between those entitled to it on the one hand and the residue on the other, was that the house was given to Mrs. Williams as from the death of the testatrix subject only to such interest as the child might ultimately take in it under what might be described as an alternative gift to her. In my opinion, however, it is not as a matter of construction possible so to read the bequest. It seems to me clear that, just as under it Mrs. Williams takes no beneficial interest in the property unless the child dies unmarried under twenty-one, so she takes no interest in it until, if at all, that event happens. In other words, the gift over to Mrs. Williams in the event of the contingency with reference to

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(1) [1905] 1 I. R. 45, 50.

(2) [1894] 1 Ch. 665.

YOUNGER the infant defendant not happening in no way affects the destination
 J. of the rents and profits while the infant's interest in the property
 1917 is in suspense. The exact point is so stated by Cotton L.J. in
 EYRE, *In re Dickson*. (1)

JOHNSON It was said, however, that, even if in the case of an ordinary
 v. contingent legatee these rents and profits might on this present
 WILLIAMS. will fall during suspense of vesting into residue, the position is
 — altered in this case by reason of the fact that the infant defendant is the daughter of the testatrix, and reliance was placed upon the rule of the Court that a contingent legacy does carry interest while in suspense in the case of a legacy by (as it is sometimes expressed) a parent or by one standing in loco parentis to the legatee. It will, however, I think, be found, on an examination of the cases in which this principle has been applied, that the father is the only parent with reference to whom the first alternative of the proposition is true. *Douglas v. Andrews* (2) very clearly indicates the reason for that limitation, and the principle is so stated in Simpson on Infants, 3rd ed. pp. 228, 240. In the present case of course the rule might have been invoked had it been the fact that the testatrix at the time of her death was indeed maintaining her child or otherwise actually standing in loco parentis towards her. This, however, as above appears, was not the fact.

If the position so far be as I have stated it, then it was, I think, agreed that s. 43 of the Conveyancing Act is of no assistance to the infant defendant: see *In re Dickson*. (1)

Although, therefore, there is in this bequest every appearance of a separate and, one may even say, a complete disposition, there is not enough, I think, in the terms of the gift to permit any relaxation of a rule which has obtained from the earliest times, and it follows in the result that the rents and profits of "Beechfield," until the infant defendant attains twenty-one or marries or dies a spinster and an infant, fall into residue, the burden of the property during the same period being in like manner borne by residue.

Solicitors: *White, Borrett & Black; Preston & Foster; Bircham & Co.*

(1) 29 Ch. D. 331, 335.

(2) 12 Beav. 310.

In re HATTON.

NEVILLE J.

HOCKIN *v.* HATTON.

1917

Jan. 11.

[1915 H. 1807.]

*Settlement—Shares partly paid up—New Shares issued—Call—Bonus—
Capital or Income—Tenant for Life and Remainderman.*

Trustees under the powers given them by the will of their testator retained, as part of his residuary trust estate, 300 shares of 10*l.* each, with 2*l.* 10*s.* per share paid up, in a prosperous Australian company. In November, 1912, the company held its annual general meeting and paid a large dividend, and issued new shares which were offered rateably to the shareholders, and the trustees took up fifty-one shares, their proportion of the new shares, and paid up 2*l.* 10*s.* per share thereon out of the capital of the testator's estate.

In February, 1913, the directors issued a circular to the shareholders stating that they had made a call of 10*s.* per share and had declared a bonus of 10*s.* per share, both payable on the same date, and that unless advised by the shareholders to the contrary before that date the bonus would be applied in payment of the call. The circular reached the trustees too late for them to reply to it, and the bonus was applied in payment of the call. On the question whether the bonus was to be treated as capital or income of the testator's estate :—

Held, that the company intended to capitalize its profits to the extent of 10*s.* per share by utilizing the bonus to pay the call, and therefore the tenant for life was not entitled to the bonus.

THE testator, who died in 1911, by his will appointed his wife and the plaintiff his executors and trustees, and gave them his residuary real and personal estate upon trust for sale and conversion, with power to postpone such sale and conversion for such period as they might think proper, and in particular for a like period to retain any investments existing at his death, whether consisting of unauthorized investments or not, and directed that from his death the income from his personal estate should be treated as income and no part thereof was to be added to capital.

The testator at the time of his death held shares in various Australian companies, and the will contained an investment clause wide enough to cover such investments. One of such companies was the United Insurance Company, Limited, in which the testator held 300 shares of 10*l.* each with 2*l.* 10*s.* per share paid up. It was a prosperous company and paid large dividends.

NEVILLE J. At the annual general meeting of the company held at Sydney on
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October 30, 1912, the directors' report and the company's accounts for the year ending the previous September 30 were adopted, and a dividend of 10 per cent. was declared and paid. In November, 1912, the directors issued a circular to the shareholders, quoting the following statement in their report which had been adopted at the annual general meeting of the company on the previous October 30 :
" In order to bring the subscribed capital up to 400,000*l.* it is proposed to issue 5839 of the 15,839 shares available and to offer them pro rata so far as possible to the shareholders at par in consideration of their paying 50*s.* per share on application therefor, and to sell the balance unallotted and odd shares at the discretion of the board This will entitle every shareholder to his proportion of new shares on the basis of, say, seventeen shares for every 100 shares held by him" and inviting applications for the new shares. In response to this circular the trustees applied for and took up fifty-one shares in respect of their holding of 300 shares, and paid the 2*l.* 10*s.* per share out of the testator's estate.

In February, 1913, the directors issued the following circular to the shareholders signed by the secretary :—

" I beg to inform you that the directors of this company have made a call of 10*s.* per share upon all shareholders, which call is payable at the office of the company on the 29th day of March, 1913.

" The directors have also declared a bonus of 10*s.* per share on all shares issued by the company, which bonus is payable to the shareholders on and after the 29th day of March, 1913.

" Unless I am advised by you to the contrary on or before the last mentioned date, the bonus to which you are entitled as above mentioned will be applied in payment of the call which will become payable in respect of your shares."

The trustees received this circular too late to reply to it in time, and the bonus was applied by the company in payment of the call. The company had a large reserve fund consisting of accumulated profits, but the bonus was in fact paid by transferring the amount of it to capital account from the cash balance standing to their credit in the profit and loss account for their financial year ending September 30, 1912.

The question having arisen whether the bonus was to be treated

as income or capital of the testator's estate, the trustees issued a NEVILLE J. summons to determine the matter.

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Dighton Pollock, for the trustees.

Ward Coldridge, K.C., and *Whinney*, for the tenant for life. The question depends on the governing intention of the company: *Bouch v. Sproule* (1); *In re Evans*. (2) Here the company did not intend to capitalize the bonus. They had ample cash available to pay the bonus, and it was a matter of absolute indifference to them whether the bonus was applied in payment of the call or not, and the shareholders were given the option of receiving the cash bonus or applying it in payment of the call. Although as between the trustees and the company there may have been a right to set off the bonus against the call, that does not affect the duty of the trustees, as between tenant for life and remainderman, to pay the call out of the capital of the testator's estate. The nearest cases to the present are *In re Malam* (3) and *In re Alsbury* (4), where the tenant for life was held entitled to a bonus; and in *In re Thomas* (5) a distribution of the reserve fund by way of dividend was treated as income and not capital.

Jenkins, K.C., and *Whitmore Richards*, for the residuary legatee, were not called upon.

NEVILLE J. The point I have to decide is whether this company, which at the same time made a call of 10s. a share and declared a bonus of 10s. on each share, as I think advisedly, to meet it, was adopting a device with the intention of capitalizing the profits by utilizing the bonus declared in payment of the call. It seems to me a plain case, because by no means could the shareholders claim payment of the bonus. They might of course have said "Give me 10s. in my hand, and I will give you 10s. back again." But there is no substance in that; it is quite an immaterial point; the 10s. had to go in payment of the call. If the company had sued for the call the shareholders could have set off the bonus, and if the company had been sued for the bonus they could have set off the

(1) (1887) 12 App. Cas. 385.

(3) [1894] 3 Ch. 578.

(2) [1913] 1 Ch. 23.

(4) (1890) 45 Ch. D. 237, 247.

(5) [1916] 2 Ch. 331.

NEVILLE J. call. It seems to me, therefore, that this is a clear case, and that
 1917 what the company was aiming at and what it intended to do was
 HATTON, to transfer the amount of the bonus from the profit and loss account
In re. to capital account and to capitalize their profits to the extent of
 HOCKIN 10s. a share. I think, therefore, that the tenant for life has no
v. right to the bonus that was declared, and that the trustees must
 HATTON. carry it to the capital account of the testator.

Solicitors: *Vizard, Oldham & Co.; Markby, Stewart & Co.*

H. L. F.

ASTBURY J.

In re THORNE.

THORNE *v.* CAMPBELL-PRESTON.

[1916 T. 1232.]

1917

Jan. 25;
Feb. 1.

*Settlement—After-acquired Property—Covenant to settle—Exception—
 Property which Donor expresses Intention to exempt—Gift for
 Purpose inconsistent with Settlement.*

Where a covenant to settle after-acquired property contains an exception of "any property as to which in the instrument under which it is acquired . . . an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature" a gift for a declared purpose wholly inconsistent with its application under the covenant is within the exception, whether the donor is aware of the covenant or not.

Thornton v. Bright (1836) 2 My. & Cr. 230, 234, 255, applied.

ORIGINATING SUMMONS.

An antenuptial settlement dated May 31, 1905, contained a covenant by the husband and wife to settle any property of or to which the wife or the husband in her right should become seised, possessed, or entitled during the coverture.

The following property (inter alia) was excepted from the covenant:—

(a) "Property of a less value than 1000*l.* vesting in possession during the said intended coverture at the same time and from a single source."

(b) "Any property as to which in the instrument under which it is acquired by the [wife] or in a writing signed by the donor of

such property either before or within three calendar months after making the gift thereof an intention is expressed that it shall be exempt from this present covenant or from any provision of a like nature.”

(c) “Moveable chattels or effects of household domestic or personal use or ornament.”

A similar clause will be found in Key and Elphinstone’s Precedents, 8th ed. (1904), vol. ii. p. 511.

By his will dated October 6, 1914, the wife’s brother, after appointing the plaintiffs (and another person who had not yet proved) his executors and trustees, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, the net proceeds to be divided equally between the wife, three other sisters, and another brother.

By a codicil dated August 4, 1915, the testator bequeathed to the wife free of duty “1000*l.* with which to purchase a memento of me which I suggest might be a pearl necklace.”

The testator died on September 27, 1915, leaving a considerable residuary estate. There was no evidence whether he knew of the covenant or not.

On November 17, 1916, the executors issued this summons to determine whether the 1000*l.* legacy was payable to the wife or to the trustees of her settlement.

W. A. Peck, for the executors. The question is whether the testator has expressed an intention that the 1000*l.* shall be exempt from the covenant “or from any provision of a like nature.”

J. W. M. Holmes, for the wife. Apart from the share in residue, the 1000*l.* is itself free of duty, so that I cannot claim under exception (a); and as there is no obligation to buy a pearl necklace I cannot claim under exception (c). But the testator has clearly expressed an intention that I am to have the power of buying a pearl necklace or anything else I like as a memento of him. This is clearly inconsistent with any provision of a like nature to a covenant to settle after-acquired property, and the 1000*l.* is therefore exempt under exception (b), which was settled by the conveyancers in order to avoid the decision in *Scholfeld v. Spooner*. (1)

(1) (1884) 26 Ch. D. 94.

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ASTBURY J. *Kenneth Wood*, for the settlement trustees. The testator might
 1917 no doubt have expressed his intention that the 1000*l.* should be
 THORNE, exempt from all provisions (if any) for the settlement of after-
In re. acquired property. But he has not in fact done so. His motive
 THORNE in giving the legacy was to enable the legatee to buy a memento.
n. But he has not imposed any obligation on her. He has in effect
 CAMPBELL- given her 1000*l.* absolutely, which apart from the covenant she
 PRESTON, could spend as she liked. There is nothing in the language of the
 — codicil to show that the possible existence of any provision for the
 settlement of after-acquired property was present to the testator's
 mind at all, and unless it was so present it is difficult to see how he
 can have expressed an "intention to exempt" within exception (b).

Cur. adv. vult.

Feb. 1. ASTBURY J. (after stating the facts). The testator by his codicil bequeathed this 1000*l.* to the wife, in addition to the share of residue bequeathed to her in his will, with the expressed object of enabling her to carry out his wishes as to its expenditure, and if it is possible to give effect to his intention in this respect it should certainly be done.

The wife is, however, given the 1000*l.* in terms which, apart from her marriage settlement, would constitute her the absolute owner of the money, unfettered in law by any obligation to devote it, or any part of it, to the purpose for which it was expressed to be given : see *In re Allnutt* (1) and *Scholfield v. Spooner* (2); and, unless it falls within the exceptions to the covenant to settle after-acquired property in her settlement, it will pass to her trustees, however much she may desire to carry out her brother's wishes.

In *Scholfield v. Spooner* (2) the Court of Appeal, notwithstanding Wood V.-C.'s decision in *In re Mainwaring's Settlement* (3), held that "Where a covenant has been entered into for settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant." Cotton L.J. said (4) : "Now suppose the father had left his daughter

(1) (1882) 22 Ch. D. 275, 278.

(3) (1866) L. R. 2 Eq. 487.

(2) 26 Ch. D. 94.

(4) 26 Ch. D. 100.

10,000*l.* absolutely for her sole and separate use, and had said in terms as clear as he could that she was to have it absolutely, and that it was not to be settled, it could hardly be contended that this 10,000*l.* was not to be brought into settlement. It was contended that *In re Mainwaring's Settlement* (1) shewed that we ought to give effect to the intention of the donor if he has said that the property was not to come into settlement. Undoubtedly there are expressions used by the learned judge who decided that case which support such an argument, but what the decision comes to is this, that, looking to the trusts of what was in that case given to the lady it was not property which could on the true construction of the covenant be considered coming within it." Bowen L.J. said (2) : "Whether property falls within a covenant to settle after-acquired property or not, must turn, as it seems to me, upon the construction of the covenant. There has been laid down a canon with reference to the construction of such covenants, that when you find the property does not fit the trusts of the settlement, then you may assume as a consequence that it was not intended to come within the covenant at all. That seems to be good sense. But that rule itself is only to my mind a rule of construction, and the question must be, whether, on the true construction of the covenant, the particular property falls within it or not. If that is the right view, it cannot be material to consider the intention with which after-acquired property has been given. A gift is not less a gift because the donor intends that it shall not follow the bargain which the party to whom it was given has made as to its devolution. You may look at the way in which it is given to see if it is a gift coming within the terms of the covenant to settle, but no declarations of intention as to what are to be the consequences can have any effect."

As the 1000*l.* is given free of duty, the only exception in the settlement which is relevant is exception (b) which excepts property, as to which in the instrument under which it is acquired, or in a writing signed within three months after making the gift, the donor expresses an intention that it shall be exempt from the particular covenant to settle after-acquired property or from any provision of a like nature.

This is a modern form of exception which has found its way into

(1) L. R. 2 Eq. 487.

(2) 26 Ch. D. 101.

ASTBURY J. conveyancing precedents to escape from the effect of the decision in 1917 *Scholfield v. Spooner* (1) and similar cases when the intentions of the donor are sufficiently expressed to give effect to them, and I have to construe its effect when, in a case like the present, the donor makes no express reference either to the particular covenant in the earlier settlement or to any provision of a like nature.

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The exception does not require that any such express reference should be made; what is required is that the donor shall in the instrument of gift or other writing mentioned express the intention that his gift shall be exempt from the fetter, and it is not necessary that he should know of the particular covenant, if he expresses his intention that the gift shall be exempt from any provision having a similar effect.

The question in this case, therefore, depends upon what construction ought to be given to the words "an intention is expressed that it shall be exempt from . . . any provision of a like nature."

In my opinion these words include a positive statement or intimation by the donor that the gift is made for the purpose of some defined expenditure or application by the donee, other than or inconsistent with handing it over to marriage settlement trustees, as well as a negative statement that the gift is not to be subject to marriage settlement trusts if there be any.

There may well be difference of opinion as to the ambit of an exception worded as the present one is, and, this being so, it is important to bear in mind the real object of its insertion in the covenant. This object is that the gift to the donee subsequent to her settlement shall, although the property is given to her absolutely, be controlled by the expressed intention of the donor in making the gift, rather than by the antecedent contract of the donee, and in my opinion it would be placing too narrow a construction upon the wording of the exception to hold that it requires a negative intention to be expressed, i.e., that the gift is not to be subject to an after-acquired property clause, if there be one, when the donor expresses an intention that it is to be applied to a purpose clearly inconsistent with its being so subject.

This may perhaps be made clearer if one assumes a case where a donor, with knowledge of the particular covenant in question,

makes his gift in such a form as the present one ; could it be said in that case that he has not expressed an intention that his gift should be exempt from the covenant when, knowing of it, he has made it for a purpose inconsistent with its being applied thereunder ? I think not : see *Thornton v. Bright* (1) and *In re Mainwaring's Settlement*. (2)

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In the present case there is no evidence whether the testator knew of his sister's marriage settlement or not.

For these reasons I am of opinion that the legacy of 1000*l.* bequeathed by the codicil is payable to the wife, and that it is not subject to the covenant in her settlement.

Solicitors : *Hopwood & Sons.*

G. R. A.

In re WILLIS.
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[1916 W. 2118.]

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—

Will—Real Estate—Equitable Limitations—Disclaimer—Acceleration of Remainders.

Testator, who died in 1899, devised real estate unto and to the use of trustees in fee simple upon trust for A. (who was his heir-at-law) during his life, with remainder in trust for A.'s first and other sons successively in tail, and in default of such issue in trust for each successively of B. and C. during his life, with remainder immediately after the death of each of them in trust for his first and other sons successively in tail, and in default of such issue in trust for testator's own right heirs. The testator also bequeathed personal estate upon corresponding trusts. A. disclaimed the devises and bequests made in his favour by the will except as to any right to which he might become entitled as heir-at-law of the testator under the ultimate trust. A. was still living, but had no son. B. (to whom the income had been paid during his life by way of family arrangement) was now dead without issue. C. was living :—

Held, that the effect of the disclaimer by A. was to accelerate the equitable remainders until a son of A. was born, and that until that event the income of the real and personal estate was not undis-

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posed of, but was now payable to C. during the joint lives of himself and A.

In re Scott [1911] 2 Ch. 374 and *Carrick v. Errington* (1726) 2 P. Wms. 361 (affirmed by the House of Lords sub nom. *Errington v. Carrick* (1728) 5 Bro. P. C. 391) distinguished.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment :—

“ By his will, dated December 18, 1895, John Willis, of Cardigan House, Richmond, in the county of Surrey, appointed his nephew, the defendant James Dunbar Willis, and the plaintiff Alexander Crossman to be executors and trustees, and after giving certain legacies he devised his freehold mansion known as Cardigan House aforesaid and all other his real estate at Richmond to and to the use of the trustees of his will in fee simple, upon trust, in effect, after the death of his sister Janet Ann Willis, for the defendant James Dunbar Willis during his life, with remainder in trust for his first and other sons severally and successively according to seniority in tail, and in default of such issue in trust for each successively of his nephews born in his lifetime and being sons of his sister Jane Steele Kirkaldy (except John Willis Kirkaldy) during his life, with remainder immediately after the death of each of the same nephews in trust for his first and other sons severally and successively according to seniority in tail, and in default of such issue in trust for his own right heirs. The testator bequeathed certain chattels to go as heirlooms with Cardigan House as nearly as the law and circumstances would permit. He devised certain real estate at Twickenham and his residuary real estate (if any) upon trust for sale, directing that the proceeds of sale, together with a sum of 80,000*l.* which he bequeathed to his trustees, should be invested and be held by them, subject to an annuity of 25*l.* in favour of his cousin Jane Dunbar Lawson, upon trusts corresponding as nearly as the law and circumstances would permit with the trusts thereinbefore declared of Cardigan House; and after giving sundry pecuniary legacies of large amount the testator directed that the ultimate surplus or residue (if any) of the proceeds of his general personal estate and ready money should be held by his trustees upon trusts corresponding as nearly as the law and circumstances would permit

with the trusts thereinbefore contained with reference to Cardigan House aforesaid. YOUNGER J.

“ The testator died on November 24, 1899, and his will was duly proved on January 13, 1900, by the plaintiff Alexander Crossman and the defendant James Dunbar Willis, who was also the heir-at-law of the testator. On June 20, 1907, the plaintiff Adam Willis Kirkaldy was duly appointed a trustee of the will in the place of James Dunbar Willis, who then retired, and the property subject to the will was in due course vested in the plaintiffs jointly upon the trusts thereof. Janet Ann Willis died on December 8, 1910, and upon her death James Dunbar Willis became entitled by the terms of the will to a life estate in the Cardigan House property and in the other property devised and bequeathed upon trust to go therewith as above stated. He refused, however, to accept such devises and bequests or any of them, and by a deed poll dated December 24, 1910, under his hand and seal he absolutely renounced and disclaimed the same, with the reservation that nothing therein contained should operate as a disclaimer or release of any right or interest to or in the said premises or any of them or any part thereof respectively to which he was or might become entitled as heir-at-law of the testator under the ultimate trusts by the said will declared concerning the same premises in favour of the right heirs of the testator. The strictly limited terms of that reservation may not be unimportant.

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“ At the date of his disclaimer James Dunbar Willis had no son—he is still without issue—and questions thereupon arose as to the effect and operation of the deed poll, more particularly whether during the life of James Dunbar Willis and until he should have a son it operated to carry the income of the real and personal property comprised in the disclaimer to the persons successively entitled in remainder under the will, or whether that income was undisposed of, in which case the view taken was that the income arising from so much of the property as was real estate would during the life of James Dunbar Willis and until he should have a son go to the heir-at-law of the testator, and that the income of so much of the property as was to be treated as personal estate would during the same period be divisible among the testator’s statutory next of kin. Counsel having been consulted, he advised that the deed poll operated to

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accelerate the remainders expectant upon the determination of the life interest of James Dunbar Willis in the property, and accordingly that the income was payable unless and until James Dunbar Willis should have a son to William Kirkaldy, the first son of Jane Steele Kirkaldy, during his life, and after his death to the persons successively thereafter entitled in remainder under the will.

“ By a deed of family arrangement dated March 17, 1911, to which the plaintiff James Dunbar Willis and the next of kin of the testator were parties, the next of kin and James Dunbar Willis agreed to be bound by that opinion, but only (as I have felt compelled to hold upon a sound construction of its provisions) so long as the income remained payable to William Kirkaldy, the first tenant for life. William Kirkaldy died on January 9, 1916, without issue, having received the income during his life. The defendant David Dunbar Kirkaldy, his brother, is the person next entitled in remainder under the will to the income of the property for his life, and the question which has now to be determined is whether he is entitled to the receipt of the income from it during the joint lives of himself and James Dunbar Willis, or during such joint lives until the latter shall have a son, or whether during the same period such income passes as on an intestacy of the testator.”

J. M. Stone, for the summons.

J. G. Wood, for David Dunbar Kirkaldy. If these limitations had been legal and not equitable, the remainders to the sons of James Dunbar Willis would have failed for want of a particular estate to support them, since the Real Property Act, 1845, s. 8, only applied to the determination by forfeiture, surrender, or merger of the preceding estate: Burton's Compendium, 7th ed., arts. 770—775; and it is submitted that the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33) (1), does not apply to the case of disclaimer.

(1) The Contingent Remainders Act, 1877, s. 1, enacts: “ Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure,

which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect

The effect of disclaimer is to destroy the estate from the commencement, and an estate which never comes into existence at all cannot be properly said to determine. Assuming, however, that the Contingent Remainders Act, 1877, does apply to the case of disclaimer, the remainder in favour of the sons of the disclaiming tenant for life would, under the terms of the Act, on the birth of a son take effect by way of "springing or shifting use or executory devise." There is therefore no objection to the acceleration of the estate of the next in remainder until a son is born, and if that would be the result in the case of legal limitations, there is certainly no reason why the same result should not follow in the case of equitable limitations. Equity in this case would follow the law. It is true that in *In re Scott* (1), which was a case of legal limitations, Warrington J. held that there was no acceleration of the estate next in remainder under similar circumstances, but I submit that Warrington J. based his judgment upon a wrong view of the Act of 1877, being of opinion that the effect of that Act was to put the limitation to the unborn son of the disclaiming tenant for life (to use the learned judge's own language (2)) "on the same footing as if there had been trustees to preserve contingent remainders." That, however, is not what the Act says. The Act says that the remainder is to take effect as if "it had originally been created as a springing or shifting use or executory devise or other executory limitation." In other words, the limitation to the unborn son is destroyed by the disclaimer as a contingent remainder but is restored by the Act as an executory limitation. There is, therefore, even in the case of legal limitations, no objection to the acceleration of the estate next in remainder subject to be subsequently defeated by the executory limitation in favour of the issue. Assuming, however, that *In re Scott* (1) was rightly decided so far as relates to legal limitations, the decision is founded on the technical doctrines of the common law relating to the seisin of the freehold, and has no application to equitable limitations, under which the seisin of the trustees always

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in all respects as if the contingent use or executory devise or other
remainder had originally been executory limitation."
created as a springing or shifting (1) [1911] 2 Ch. 374.
(2) [1911] 2 Ch. 380.

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prevented the destruction of the contingent remainders. In the case of equitable limitations, therefore, there is no difficulty in giving effect to a trust estate for the time being in force without regard to the artificial rules of the common law, and in the present case it is sufficient to rest my argument on this ground alone without impugning the actual decision in *In re Scott*. (1) The ultimate trust in favour of the testator's own right heirs is of itself an indication that the testator in the present case did not intend his heir-at-law to take under an intestacy at any earlier period, but intended to make an exhaustive disposition under the prior trusts. *Carrick v. Errington* (2), which was a case of equitable limitations created by deed, will be relied on against me; but in that case there was an estate to trustees to preserve contingent remainders interposed immediately after the life estate which failed, though it was quite unnecessary, since the limitations there were equitable, and the House of Lords held that there was no acceleration of the estate next in remainder; but that decision, so far as it is intelligible from the reports, lays down no general rule applicable to the construction of equitable limitations created by will, and one ground of the decision appears to have been that it was the trustees' estate which was accelerated, and as they could not take beneficially the rents were undisposed of, and if so the case is an authority in my favour rather than against me: see per Lord Hardwicke in *Hopkins v. Hopkins*. (3) The decision of the Court as to the rents of the real estate will also govern the destination of the income of the personal estate.

Austen-Cartmell, for the heir-at-law and next of kin. The income of the real and personal estate is undisposed of during the life of James Dunbar Willis until he shall have a son. The argument against me, so far as it rests on the view that the Contingent Remainders Act, 1877, has the effect of accelerating the estates next in remainder, is directly opposed to *In re Scott*. (1) That case really shows that the effect of the Act is to bring legal limitations into line with equitable limitations. In the case of equitable limitations there is no authority to show that either before or after the passing of the Contingent Remainders Act, 1877, any interim estate would

(1) [1911] 2 Ch. 374.

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(2) 2 P. Wms. 361; affirmed 391.

by the House of Lords sub nom. (3) (1738) 1 Atk. 581, 597.

under similar circumstances go to the next remainderman. An estate cannot go and come back again without an express limitation for the purpose, and if it once gets into the next remainderman it cannot get back into the issue of the disclaiming tenant for life, the limitation in favour of the issue being the prior limitation. That was the true ground of the decision in *Carrick v. Errington* (1), which is a direct authority in my favour. The Contingent Remainders Act, 1877, has nothing to do with equitable limitations, which stand on the same footing as prior to that Act. The importance of *In re Scott* (2) in the present case is that Warrington J. there held that if the limitations had been equitable the rents would have been undisposed of, and then held that the Act of 1877 brought legal limitations within the same rule. Under the Act of 1877 the remainder to the unborn issue takes effect when issue come into being as a springing use on the particular estate only and not on the subsequent remainders. The law as to equitable limitations is stated in Challis's Law of Real Property, 3rd ed. p. 122. So far as relates to the personal estate bequeathed on trusts corresponding with those of the real estate, *In re Townsend's Estate* (3) is a direct authority in my favour, where, the prior life estate having failed to take effect under s. 15 of the Wills Act, Chitty J. held that the gifts over on the determination of that estate were not accelerated. [He also referred to *Jull v. Jacobs* (4), *In re Clark* (5), *In re Johnson* (6), *Aplin v. Stone* (7), and *In re Vernon*. (8)]

J. G. Wood in reply.

Cur. adv. vult.

Dec. 13. YOUNGER J. delivered a written judgment in which he stated the facts above set out and continued: The limitations contained in and the beneficial interests in the property conferred by the will are all of them, it will be seen, strictly equitable. Accordingly the contingent remainder of his possible future issue was never endangered by the disclaimer of James Dunbar Willis's particular

(1) 2 P. Wms. 361 ; affirmed
by the House of Lords sub nom.
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(2) [1911] 2 Ch. 374.

(3) (1886) 34 Ch. D. 357.

(4) (1876) 3 Ch. D. 703, 709.

(5) (1885) 31 Ch. D. 72.

(6) (1893) 68 L. T. 20.

(7) [1904] 1 Ch. 543.

(8) (1906) 95 L. T. 48.

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estate and required no statute to protect it, the principles which in such circumstances a Court of Equity applies being very conveniently stated by Lush L.J. in *Abbiss v. Burney* (1) as follows: "Where the legal fee was given to trustees by the same instrument, so that there were persons always at hand to fulfil the requirements of the feudal law, the Courts of Equity dealt with those equitable limitations according to their own principles, and, disregarding the feudal law to which there was no necessity to pay any attention as its requirements were already satisfied, they carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will."

Turning then to the limitations of the Cardigan House property with these principles in mind, it is noticeable, first, that the entire interest therein is parcelled out amongst the successive devisees, and it is not for the present purpose unimportant that the last limitation is to the testator's own right heirs. This limitation certainly excludes the idea of any intention or belief on the part of the testator that these heirs should or would take anything at any prior step in the limitations. Secondly, the interests are given in immediate succession, and there is nothing to indicate any other reason for the postponement of any one interest to any other beyond the all-sufficient reason that no later interest is to impinge upon an earlier one. The limitations are so expressed as to make the observations of Malins V.-C. in *Jull v. Jacobs* (2) specially apposite, and there are no limitations here like that in *Aplin v. Stone* (3) which would make subsequent benefits depend upon an earlier devisee dying before or after a particular person or date.

Now no claim to the income at present in question is put forward on behalf of any possible son of James Dunbar Willis; it is conceded that such a son can have no interest in any income accrued prior to his birth, and it is in these circumstances difficult to see, now that James Dunbar Willis has in fact disclaimed his life interest in that income, and that no son of his, even if hereafter born, has any title to it, why it is not in accord with the plain intent of the testator, as evidenced by the words he has used in his will, that that income pending the birth of a son to James Dunbar Willis should be paid to

(1) (1881) 17 Ch. D. 211, 233.

(2) 3 Ch. D. 703.

(3) [1904] 1 Ch. 543.

the person next entitled in the prescribed order of succession, and, unless there is either some technical reason or some binding authority to the contrary, I think I ought so to hold.

Now one technical objection only has been urged against that destination of the income. It is said that it is impossible to have an estate in remainder brought to an end so as to let in an estate previously limited, and that objection was, it is true, treated by Warrington J. in *In re Scott* (1) as fatal in circumstances superficially not dissimilar from those in the present case. But between *In re Scott* (1) and this case there is one all-important distinction: the limitations there were legal; there was not there, as there is here, an outstanding legal estate in trustees with equitable limitations only declared. In reference to such limitations, a technical objection of that kind which may be fatal where the limitations are legal has not, as it seems to me, necessarily any force. A trust to trustees to pay the income of trust property to A. during the life of B. until B. has a son, and then to pay the income to or to hold the property from which it proceeds for that son, is a trust to which, so far as I am aware, no technical objection can be taken. Nor can I see any reason why in this very case such a trust should not be implied, if the intent to that effect is, as I hold it to be, clear, and an intestacy as to the income is the only alternative. For in determining the effect of these limitations, equitable as they are, it is the intent properly ascertained which must prevail. Had they been legal limitations different principles, as appears from *In re Scott* (1), might have been applicable. "The determination of this question," says Warrington J. in that case (2), "is not one of construction, but it depends entirely upon the legal effect, in the events which have happened, of the limitations in the testator's will"; and for the reason which I have given, amongst others, the learned judge held in that case, where the limitations of the will, although in other respects very similar to those in the present case, were legal and not equitable, that the disclaimed rents were undisposed of and under the will in that case fell into residue. For the reason which I have given, however, that decision is not, in my opinion, applicable to the present. It was, however, very strongly urged by Mr. Wood that *In re Scott* (1) proceeded upon a mistaken view of the

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effect of the Contingent Remainders Act, 1877, and that the actual result in that case ought to have been different, and that even there the disclaimed rents ought to have gone to the person next entitled in succession. The decision too has exercised the mind of the profession and has evoked two very critical articles in the *Law Quarterly Review* (1) by a learned real property lawyer well known to us all. But all that I pass by, for, although it will be very interesting to see how far *In re Scott* (2) will withstand its critics when it comes up for review before the Court of Appeal, it is a decision binding upon me, and I need hardly say that had I thought it applicable in this case I should have considered it my duty to follow it without question.

It is further said, however, by Mr. Austen-Cartmell that this case is concluded in favour of the heir-at-law and next of kin by the decision in *Carrick v. Errington*. (3) In that case Edward Errington by a lease and release settled the equitable interest in property, the legal estates in which were then outstanding in trustees, to the use of himself for life, remainder to the use of his issue in tail (he had at that date no issue), remainder to the use of Thomas Errington, a Roman Catholic, for life, remainder to the use of trustees during Thomas's life upon the usual trust to preserve contingent remainders, remainder to the use of Thomas's first and other sons in tail, remainder to the use of William Errington, an Anglican, for life, with remainders over. The question after the settlor's death was who should take the rents and profits during Thomas's life, his life estate (he being a Roman Catholic) being by statute null and void. It appears from the report of the case in Peere Williams that the trusts upon which the interposed trustees held the estate were in the form usual for that purpose, and these as set forth in Burton's Compendium (7th ed., art. 776) would be a limitation to the use of the trustees and their heirs during the life of Thomas Errington in trust for him and to preserve contingent remainders. Now in these circumstances it was held by Lord Chancellor King, and his decision was affirmed in the House of Lords, that the rents during Thomas's life resulted to the heir-at-law of the settlor. This was all that was

(1) Vol. xxxii. pp. 83, 392.

(2) [1911] 2 Ch. 374.

(3) 2 P. Wms. 361; affirmed

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decided. The precise ground upon which the decision was reached is not very easy to determine from the reports of the case. In a note of it which is to be found in Lord Hardwicke's judgment in *Hopkins v. Hopkins* (1) it is said that " Lord King and afterwards the House of Lords held that the trust—to preserve contingent remainders—being not only to receive rents &. but also to preserve contingent remainders, and possibly a person capable of taking might come in esse, that *that* was a further trust, which the statute did not make void ; it had indeed avoided that for life, but as there was another trust upon the legal estate, which might, by possibility, be capable of being enjoyed, the estate should remain in the trustees, to support the contingent remainders ; and as to the profits in the meantime (for the remainderman could not take them, nor the trustees, they being only mere instruments) the heir at law should have them, till some person came in esse, capable of taking under the contingent remainders." It would appear from that statement that the ground of the decision was that, as the trust of the rents for Thomas was void, and the trustees, being only trustees, could not take the rents for themselves, although their estate was still interposed as against the subsequent remaindermen for purposes in which these remaindermen had no part or lot, the rents were necessarily undisposed of and reverted to the heir of the settlor. Now it is quite true that as the estates settled were held by the settlor for an equitable interest the trust to preserve contingent remainders was for that purpose quite unnecessary. Its inclusion may explain the fact, difficult otherwise to account for, that it was not apparently always present to the minds of all engaged in the case that the interests with which they were concerned were equitable only ; and indeed the statement that the interests were legal and not equitable is duly reported as having been made by counsel for the appellants in the House of Lords, and one may indeed suspect that some passages in the reports of the case which are difficult to understand as applied to equitable interests may well have been dicta used with reference to legal limitations, which in form the limitations in question were. In the House of Lords the basis of the decision as reported is clearer. It appears from the report (2) that the argument of Mr. Peere Williams on behalf of the respondent was accepted by the House.

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(1) 1 Atk. 581, 597.

(2) 5 Bro. P. C. 395.

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That argument as reported was "that the appellant (William Errington) was not by the settlement to take any estate, until the death of Thomas Errington without issue male, who might have issue male that might be protestants. That Thomas being a papist, and disabled to take by virtue of the statute, and the appellant not being entitled until Thomas should be dead without male issue, the premises during the life of Thomas, ought to go and belong to the heirs at law of Edward who made the settlement, as an estate undisposed of by him," and the report proceeds: "Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the decree complained of, affirmed."

Now on a full consideration of that case of *Carrick v. Errington* (1) it appears to me impossible to hold that it has laid down any general rule applicable to the construction of equitable limitations and fixing the destination of intermediate rents and profits where a prior interest having been destroyed there is interposed between it and the next vested interest a contingent interest which has not and which never may come into existence. A fortiori does it appear to me that it can be no authority for determining the destination of these rents and profits in the case of a series of equitable limitations amongst which no estate to preserve contingent remainders with express trusts in relation to it is interposed. Further, the limitations in *Carrick v. Errington* (1) were contained in an assurance by way of lease and release, and its application to the construction of dispositions contained in a will must at least be qualified. There is indeed one view of *Carrick v. Errington* (1) upon which it may be treated as an authority not against the claim here of David Dunbar Kirkaldy to the intermediate income, but as an authority in his favour. In *Carrick v. Errington* (1) Lord King would apparently have been ready to hold that the rents and profits there in question would have devolved upon the trustees as the owners of the next vested estate in freehold for their own benefit if it had not been plain that as trustees they were not entitled to them for their own use. In the present case David Dunbar Kirkaldy is the person entitled to the next equitable estate of freehold in succession, and

(1) 2 P. Wms. 361; affirmed *Errington v. Carrick*, 5 Bro. P. C. by the House of Lords sub nom. 391.

he is under the will entitled for his own use to any rents which accrue to him in respect of that interest. From that point of view Lord King's observations in *Carrick v. Errington* (1) are in his favour.

In my opinion, therefore, the conclusion at which I have arrived as to the true effect and intent of the limitations contained in this will is not rendered incapable of having effect given to it either on principle or by authority. It follows that in my judgment the income which has accrued in respect of the settled property since the death of William Kirkaldy ought to be paid by the trustees to the defendant David Dunbar Kirkaldy during the life of the defendant James Dunbar Willis or until he shall have a son born to him.

Solicitors: *Crossman, Prichard, Crossman & Block; W. C. Broadbridge.*

A. C.

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[1916 C. 1249.]

Will—Legacy out of Residue given on Trust for Sale—Powers to postpone and appropriate—Interest at 3½ per Cent. in Meantime given on Legacy—Bona fide Refusal of Trustees to raise Legacy or appropriate—Refusal not proper Exercise of Discretion—Reference back to Trustees to exercise Discretion.

Testatrix by her will devised and bequeathed her residuary real and personal property to her trustees upon trust to sell and convert and out of the money to arise from such sale and conversion to raise the clear sum of 230,000*l.* and to invest the same in manner thereby authorized. And she declared that "all or any part" of the said sum of 230,000*l.* which should not for the time being have been raised or appropriated should bear interest from her death at the rate of 3½ per cent. per annum and such interest should be deemed "part of the income of the investments representing" the 230,000*l.* And she declared that the trustees should stand possessed of the 230,000*l.* and the investments for the time being representing the same, thereafter designated "the trust fund,"

(1) 2 P. Wms. 361; affirmed *Errington v. Carriek*, 5 Bro. P. C. by the House of Lords sub nom. 391.

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upon trust to pay "as from the day of my death" the income of the trust fund to R. B. C. during his life, and after his death to hold the same on the trusts therein mentioned. Subject and without prejudice to the raising of the 230,000*l.* the testatrix directed that her trustees should hold the residue upon certain trusts therein mentioned. She empowered her trustees at any time or times in their "uncontrolled discretion" to appropriate unconverted investments in or towards satisfaction of the trust fund and "at their discretion" to postpone the sale or conversion "of any part or parts" of the residue and directed that the income of the unsold residue should "from the period of my death" go as the income of the proceeds of sale would go "if such sale or conversion into money were then actually made." The trustees refused to raise or appropriate to the legacy or any part thereof, not because of any alleged difficulty in realization, or on any suggestion that the investments of residue if retained would rise in value, but because (as the Court found) if they did so there would be little or nothing left for the ultimate residue:—

Held, that the trustees in so doing, although they had acted with an honest intention, had proceeded on a misconception of the relative rights of the legatees and the ultimate residue in not regarding the paramount right of the legatees of the 230,000*l.* over the ultimate residue, and had therefore not exercised their discretion with due regard to the purposes for which alone it was conferred on them; that therefore they had not really exercised their discretion at all; and consequently that it must be referred back to them to consider the exercise of their discretion, but on a proper basis.

Hampden v. Earl of Buckinghamshire [1893] 2 Ch. 531 applied.

Held, also, on construction, that as and when any sale was made and the proceeds applied, or other appropriation made, in or towards satisfaction of the legacy, the investment so sold or appropriated must be deemed to have been appropriated to the legacy by relation back to the day of the testatrix's death, so as to make the interim dividends interim income of the legacy, the 3½ per cent. interest being brought into account.

ADJOURNED SUMMONS.

Lady Margaret Charteris, by her will dated December 31, 1909, after appointing the Hon. Claude William Biddulph and the Hon. Louis George Greville executors and trustees and making various specific devises and bequests, subject thereto devised and bequeathed to her trustees all her real and personal property upon trust to sell and convert into money such parts of the same property as should not consist of ready money, and out of the money to arise as afore-said and her ready money to raise the clear sum of 230,000*l.* free of all duty (including settlement estate duty), costs, and other deduc-

tions which she thereby directed should be paid out of the residue of the said money, and to invest in manner authorized the said sum of 230,000*l.* And she declared that "all or any part" of the said sum of 230,000*l.* which should not for the time being have been raised, or for which property should not have been appropriated under the power thereafter contained, should bear interest from her death until such raising or appropriation at the rate of $3\frac{1}{2}$ per cent. per annum, and such interest should be deemed to be "part of the income of the investments representing" the said sum. And she declared that her trustees should stand possessed of the said sum of 230,000*l.* and the investments for the time being representing the same respectively, which sum and investments were thereafter designated "the trust fund," upon trust to pay "as from the day of my death" the annual income of the trust fund to Richard Butler Charteris during his life, and after his death she directed her trustees to hold the trust fund and the income thereof on certain trusts not material to be here stated. And the testatrix directed that, subject and without prejudice to the raising of the said sum of 230,000*l.* out of the moneys to arise as aforesaid and to the trusts thereinbefore declared concerning the same, her trustees should hold the said money and the investments for the time being representing the same upon trust in effect to transfer and pay one moiety thereof to the trustees of a certain settlement dated December 12, 1887, and the other moiety thereof to the trustees of another settlement dated April 6, 1894. And in substitution for the power conferred on personal representatives by the Land Transfer Act, 1897, the testatrix empowered her trustees at any time or times in their or his "uncontrolled discretion" to appropriate any part of the property whether real or personal thereinbefore devised and bequeathed to her trustees upon trust for sale and conversion in its then actual condition or state of investment in or towards satisfaction of the "trust fund" or any legacy or share in the premises, and for that purpose to determine conclusively the value of the trust premises or any part or parts thereof in such manner as they or he should think fit. And she further empowered her trustees at their discretion to postpone or delay the sale or conversion into money "of any part or parts" of her real and personal estate thereinbefore directed to be sold and converted into money, and to allow

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the same respectively to remain in the state of investment or condition existing at the time of her death, and directed that meanwhile the rents and profits and income arising from the real or personal property so remaining unsold or unconverted into money (whether such property was of a permanent or a wasting nature), after payment thereout of all rates, taxes, expenses of insurance, and repairs and other outgoings which her trustees should think fit to pay, should from the period of her death go and be paid to such person or persons and be applied in such manner as the annual income of the moneys to be produced by such sale or conversion into money would go and be payable unto or be applicable in "if such sale or conversion into money were then actually made," but so that no reversion or other property not actually producing income should be treated as producing income for the purposes of the will. And the testatrix authorized the trustees to determine all questions or matters of doubt arising in the administration of her estate or the execution of the trusts of her will and declared that every such determination, whether made upon a question actually raised or merely implied in the acts or proceedings of the trustees, should be conclusive and bind all persons interested under the will.

The testatrix died on February 21, 1915. She was survived by her two sons Richard Butler Charteris, her elder son, and Edmund Butler Charteris, her younger son, both of whom had attained twenty-one at the date of her death.

The settlement of December 12, 1887, to the trustees, of which one moiety of the residue was to be paid, was a settlement made by R. B. Charteris under which there was reserved to him a first life interest in the funds thereby settled; and the settlement of April 6, 1894, to the trustees, of which the second moiety of the residue was to be paid, was one made by E. B. Charteris under which there was reserved to him a first life interest in the funds thereby settled. It followed that in the result the question whether any substantial pecuniary provision was by the will made for E. B. Charteris depended upon the amount of residue payable under its terms to the trustees of the settlement of April 6, 1894.

The trustees had paid the debts of the testatrix and the pecuniary legacies given by her will, and they had duly kept down the annuities thereby bequeathed. There remained in their hands a large number

of securities of high class and of great value available to meet the legacy of 230,000*l.*, the annuities and duties, and the other payments for which provision had still to be made.

On December 22, 1915, the trustees through their solicitors sent to Messrs. Farrer & Co., the solicitors for the plaintiff, two lists of these investments marked 1 and 2, those in list 1 being the securities which, taken at their Stock Exchange prices on February 21, 1915, the date of the death of the testatrix, the trustees proposed to allocate in satisfaction of the legacy of 230,000*l.*, those in list 2 being the securities which on that footing would remain available for the other payments referred to, and for residue. Objection was taken on behalf of R. B. Charteris to the proposed appropriation, on the ground that by December, 1915, the prices of the securities had fallen considerably below the prices of February 21, 1915, and that many of them were taken at the minimum Stock Exchange prices then prevailing, which were admittedly far in excess of any then realizable value that they possessed. In deference to these objections the trustees caused the securities to be revalued.

On February 17, 1916, Messrs. Hallows & Carter, the solicitors for the trustees, sent to Messrs. Farrer & Co. the result of that revaluation, with a letter of that date in the following terms : “ We have now had prepared by Messrs. Capel a revaluation of the two lists of investments to show the present values (the value being taken as on the 1st inst.). We enclose copies of the two lists, from which you will see that the stocks proposed to represent the settled legacy are now valued at 211,424*l.* 7*s.* 1*d.*, being a depreciation of 18,576*l.* 2*s.* 9*d.* on the former values, and the remaining stocks are now valued at 81,082*l.* 19*s.* 8*d.*, being a depreciation of 10,056*l.* 8*s.* Many of the prices are minimum prices, at which the stocks could not now be sold. At present prices, to make up the settled fund to 230,000*l.* about 20,000*l.* would have to be deducted from the 81,082*l.* 19*s.* 8*d.*, thus reducing that amount to about 61,000*l.* The legacy of the bonuses amounting to 17,355*l.* 17*s.* 1*d.*, a loan from Messrs. Coutts & Co. of 29,297*l.* 1*s.* 9*d.* advanced for estate duty, about 10,000*l.* to answer annuities, and a sum to answer legacy duties, in addition to other payments, have to be provided for. Under these circumstances the executors find themselves in such a position that it will not be advisable for them at present to appropriate the 230,000*l.*,

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and they therefore propose to continue to pay to Colonel R. B. Charteris the interest at $3\frac{1}{2}$ per cent. We much regret that the executors are not in a position to appropriate this legacy, but they are governed by circumstances over which they have no control.” Further correspondence followed to which it is unnecessary to refer, because the attitude of the trustees in relation to the matter was stated in the affidavit made by them in these proceedings which expressed their considered views.

Ultimately this summons was taken out by R. B. Charteris to have it determined in effect whether in refusing to raise the legacy of 230,000*l.* by sale or appropriation at their realizable value of securities sufficient for the purpose the trustees were acting within the powers conferred upon them by the will.

The perfect good faith in the matter of the trustees and their advisers in taking up the position which they did was in no way questioned or doubted, and that position was explained in the affidavit already referred to, which was in the following terms:—

“2. Lady Margaret Charteris left two sons and no more namely the plaintiff and Edmund Butler Charteris who is still alive.

“3. The testatrix left her residuary estate as to one moiety to the trustees of a settlement under which the plaintiff has the first life interest and as to the other moiety to the trustees of a settlement under which the said Edmund Butler Charteris has the first life interest.

“4. Besides the large discretion conferred on us by her will as shown in the affidavit of the said Joseph Arthur Burrell the testatrix authorized us to determine how valuations are to be made or value determined and to determine all questions or matters of doubt arising in the administration of her estate or the execution of the trusts of her will and she declared that every such determination should be conclusive and bind all persons interested under her will.

“5. It is our duty as we understand it to protect the interests of the residuary legatees as well as the legatees of the trust fund of 230,000*l.*, and in our opinion it would not be fair on the plaintiff's brother the said Edmund Butler Charteris if we sold sufficient of the investments now forming the estate of the said Lady Margaret Charteris or appropriated sufficient of them to meet the said trust

fund at the market price of the day, and as the plaintiff is entitled to the income of one moiety of the residuary estate only half the loss of which he complains falls on him.

"6. We should have been willing to appropriate investments for the said trust fund if we could have done so at their market value at Lady Margaret Charteris's death, but we are advised that the value must be that at the time of appropriation.

"7. In the exercise of the wide discretion which Lady Margaret Charteris reposed in us we have therefore determined to postpone or delay the sale or conversion into money of investments forming part of Lady Margaret Charteris's estate and the appropriation of sufficient of such investments to satisfy the said trust fund of 230,000*l.* until the times are more favourable, though it is possible that we may in the exercise of our discretion appropriate some of the investments which have a fixed value towards such satisfaction and we submit that as our bona fides is not questioned the Court should not interfere with our exercise of the discretion reposed in us."

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Clauson, K.C., and *F. E. Farrer*, for the plaintiff. Although the will gives the trustees a power to postpone the conversion of any part or parts of the estate, though not in words the whole of the estate, it gives them no express power to postpone the appropriation or raising of the plaintiff's legacy itself. The primary trust is to raise the legacy, on which income is given from the death. Until the legacy has been raised in full, and the dividends on the investments which are ultimately applied to the legacy, accruing as from the testatrix's death, have been paid as income of the legacy, the ultimate residue takes no interest. The discretion to postpone conversion is a management power and must be exercised within its ambit, and must not be used to benefit one beneficiary at the expense of another: *Rowlls v. Bebb*. (1) If the Court sees that a trustee, although acting bona fide, is doing so unjustly towards those whose interests he is bound to consider and protect, it is its duty to interfere: *Hampden v. Earl of Buckinghamshire* (2); *In re Hunt's Settled Estates*. (3) The trustees here have taken a wrong

(1) [1900] 2 Ch. 107.

(2) [1893] 2 Ch. 531, 544.

(3) [1905] 2 Ch. 418, 424; [1906] 2 Ch. 11.

YOUNGER J. view of their duty. Their object is to benefit the ultimate residue at the expense of the legacy or prior charge.

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CHARTERIS, but on account of income of the investments ultimately applied to the legacy. The plaintiff, however, is willing to waive his claim to further income for the first year from the death than that interest. CHARTERIS v. BIDDULPH.
— Even if the plaintiff cannot at once receive the extra income because the trustees delay appropriation, they cannot distribute the income in the meantime to the ultimate residue, for by relation back the plaintiff is entitled as from the death to the income of the funds ultimately applied to the legacy.

Broughton, for the trustees of the will. In the exercise of the discretion reposed in them by the testatrix the trustees must have regard to the interests of all persons entitled to the estate: *In re Sandys*. (1) This is a stronger case than that. The power to postpone in the present case was inserted for the benefit of the legatees of the ultimate residue. If so, that meets the objection as to altering the rights of the parties.

[YOUNGER J. I should have thought that the power to postpone was given by the testatrix for the protection of her estate.]

No doubt that is so. If the trustees have exercised the discretion given them for the benefit of all parties the Court will not interfere: *Gisborne v. Gisborne* (2); *Tempest v. Lord Camoys* (3); *In re Blake*. (4) The Court has here no right to control the discretion of the trustees, which the testatrix has said is to be uncontrolled.

Mathew, K.C., and *Dighton Pollock*, for the trustees of the settlements of December 12, 1887, and April 6, 1894, representing ultimate residue. There is no unfairness here in what the trustees propose to do. The discretion to postpone must always, if it is to be exercised at all, be exercised for the benefit of the residue. The plaintiff is under no risk of losing his money. The Court will only interfere with the discretion so far as it is exercised on a wrong basis. It will not take over the administration of the estate. The cases cited on behalf of the plaintiff are not applicable. In *Rowlls v. Bebb* (5) no discretion was exercised. In the other cases there was no question

(1) [1916] 1 Ch. 511, 515.

(3) (1882) 21 Ch. D. 571.

(2) (1877) 2 App. Cas. 300.

(4) (1885) 29 Ch. D. 913, 917.

(5) [1900] 2 Ch. 107.

of discretion. The object of the testatrix here was to give the trustees the widest possible powers. The trustees' affidavit shows that they are anxious to preserve an even hand and to protect the estate.

[YOUNGER J. The effect is that in the meantime the surplus goes into residue.]

Clauson, K.C., in reply.

[YOUNGER J. If the trustees have exercised their discretion on a wrong principle, ought they not to be allowed an opportunity of reconsidering the matter ?]

The Court should itself exercise the discretion, for the mind of the trustees must be affected by what they have honestly but mistakenly done. If a man has appointed in fraud of a power, before he can make a second appointment which will be valid his mind must be shown to be discharged from the taint that vitiated the first appointment : *Farwell on Powers*, 2nd ed. p. 205.

But the summons asks and the plaintiff asks for administration. The Court will control the exercise of the discretion, and with this object an administration order should be made.

[*Mathew, K.C.* An administration order would not take away the power.]

The Court would no doubt pay more regard to the views of trustees who have a discretion than to those of trustees who have not such a discretion. Where an administration order is made the discretion still continues in the trustees, but the Court will control its exercise.

[*Mathew, K.C.*, referred to *In re Gadd*. (1)]

In *Gisborne v. Gisborne* (2) the alleged beneficiary took nothing except through the discretion of the trustees, and unless the trustees had exercised the discretion in her favour she was not a beneficiary at all. In the present case the legacy is wholly independent of, and the plaintiff's rights do not depend upon, the discretion of the trustees.

Cur. adv. vult.

Dec. 21. YOUNGER J. read the following judgment, in which, after stating the facts substantially as above set out and referring to the decision of the trustees as embodied in paragraph 7

(1) (1883) 23 Ch. D. 134.

(2) 2 App. Cas. 300.

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of their affidavit, he continued : Now that decision appears to me to involve that in the discharge of what they believe to be their duty to residue the trustees would have been willing to appropriate securities to meet the 230,000*l.* at the values current at the testatrix's death, and none the less although the values at that date were largely nominal and have since greatly decreased ; further, that their only reason for not now appropriating as at that date so as to bind the plaintiff by the appropriation is that the imputed value must, as they are advised, be the value at the actual date of appropriation ; and they now refrain from making any appropriation or from proceeding to realize any of the securities towards meeting even a part of the legacy, not because that appropriation would now be inexact or the realization difficult, and not because they are advised or believe that the prospects of more favourable realization are either immediate or, even if remote, reliable, but merely, as I think, because either appropriation or realization at the present time would leave little or nothing for residue ; and they are not deterred from this decision by the fact that it involves, as they read the will, that nothing more shall in the meantime be paid to the plaintiff beyond 3½ per cent. per annum by way of interest on the amount of his unpaid legacy, a rate far below the current yield of the securities at the present time required to provide for his legacy.

Now not only by the will is the payment of this legacy made paramount to any interest in residue, but its priority in undiminished amount is particularly emphasized. It is to be "a clear sum of 230,000*l.* free of all duty including settlement estate duty costs and other deductions," and the residue is given "subject and without prejudice to the raising of the said sum of 230,000*l.* out of the money to arise as aforesaid and to the trusts hereinbefore declared concerning the said sum." It seems plain, therefore, that the trustees' first duty in a question with residue is to provide that legacy in full, and that special duty serves to distinguish the case from that of *In re Sandys* (1), to which some reference was made in the course of the argument. And I cannot doubt that, although with the best intentions, the trustees have not regarded that duty as of paramount obligation ; on the con-

trary they have, as their explanation shows, entirely reversed the position, and have treated the claims of residue as their first care to the most material prejudice of the rights of the legatee of the 230,000*l.* Notably is this the case in the rate of interest to which under their decision the plaintiff will, as they conceive, be confined. He will receive $3\frac{1}{2}$ per cent. only. Investments at their present value sufficient to meet his 230,000*l.* are yielding probably from at least $5\frac{1}{2}$ to 6 per cent. ; the difference will go to residue to his prejudice.

In my opinion this cannot be right, and it shows, as I think, what from other indications in their affidavit is reasonably clear, that the trustees, from the best possible motives I do not doubt, have misconceived their position and have not exercised their discretion with due regard to the purposes for which alone it was conferred on them. In other words, they have not, as I think, exercised their discretion at all in any proper sense of the term.

But it is said the Court cannot control any purported exercise by them of their discretion when their bona fides is in no way questioned, and *Gisborne v. Gisborne* (1) and other like cases are referred to. And it is true that so far as appropriation is concerned the trustees' discretion is described as "uncontrolled," although no similar term is used in relation to their discretion to postpone conversion, by means of which of course the plaintiff's legacy might be paid in cash. Indeed the trustees' power in that behalf is unusually limited, confined as it is to "any part or parts of my real and personal estate," and not in terms, as is usual, extended to the whole or any part or parts thereof. It is doubtful, therefore, whether such authorities as *Gisborne v. Gisborne* (1) can for any finally effective purpose be relied upon in this case by the trustees or by those interested in residue. Even, however, if these authorities are in point, I am of opinion that in the present case the trustees cannot claim their protection. For reasons I have given it can, I think, be shown from their own statements that they have not exercised at all their discretion as properly defined, and if I be right in this conclusion of fact, then the consequence that the matter should be sent back to them to exercise their powers on proper principles would follow notwithstanding

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that their discretion is described as uncontrolled. Equally, on the other hand, if I be wrong in arriving at that conclusion, would that consequence not follow even if their discretion were not so qualified, or shall I say amplified? In truth the line of authority applicable to the case is, I think, that illustrated by the following passage from the judgment of Lindley L.J. in the case of *Hampden v. Earl of Buckinghamshire*. (1) "An honest trustee," says Lindley L.J., "may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere." In my opinion, therefore, the defendant trustees must again, on proper principles, take into consideration the raising of this legacy either by appropriation or by realization of securities, remembering that it is not in any case, as they seem hitherto to have thought, necessarily a case of all or nothing.

But further there is another matter to be considered which may most materially affect the exercise by the trustees of their discretion even in the interests of residue. What, with regard to interest on his legacy, are the rights of the plaintiff? It has been assumed by the trustees that these rights are represented by interest at $3\frac{1}{2}$ per cent. per annum from the date of the death of the testatrix. On a sound construction of her will I do not think this is so. The provisions on the subject are very special and peculiar. The first is this: "And I declare that all or any part of the said sum of 230,000*l.* which shall not for the time being have been raised or for which property shall not have been appropriated under the power hereinafter contained shall bear interest from my death until such raising or appropriation at the rate of $3\frac{1}{2}$ per cent. per annum and such interest shall be deemed to be part of the income of the investments representing the said sum And I declare that my trustees shall stand possessed of the said sum of 230,000*l.* and the investments for the time being representing the same respectively which sum and investments are hereinafter designated 'the trust fund' Upon trust to pay as from the day of my death the annual income of the trust fund to Richard Charteris during his life." Now interest at $3\frac{1}{2}$ per cent. under that provision on all the 230,000*l.* is to be deemed

(1)₁[1893] 2 Ch. 531, 544.

to be part of the income of the investments representing the said sum, and that appears to me to amount to a suggestion that investments ultimately appropriated are, so far as the income is concerned, treated as forming part of the fund from the date of the death; otherwise I can find no proper signification to be attached, nor has any proper signification been attached in the argument, to the expression "deemed to be part of the income" which is to be found in that phrase. And that view is confirmed by the latter part of the will, which I have already read, that part which provides as follows: "And I hereby further direct that meanwhile the rents profits and income arising from the real or personal property so remaining unsold or unconverted into money (whether such property be of a permanent or wasting nature) after payment thereof of all rates taxes expenses of insurance and repairs and other outgoings which my trustees shall think fit to pay shall from the period of my death go and be paid to such persons or person and be applied in such manner as the annual income of the monies to be produced by such sale or conversion into money would go and be payable unto or be applicable in if such sale or conversion into money were then actually made but so that no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will." It appears to me from both of these clauses that in the final appropriation the plaintiff as against residue will be entitled not only to 230,000*l.*, but to the interest upon the securities actually sold or appropriated to meet that sum as from the date of the death until appropriation or payment, and he will not, in my opinion, be confined to interest at 3½ per cent. per annum. The plaintiff on this view intimates that, whatever his rights may be, he does not claim such interest from any date earlier than one year from the death. It may be convenient to take a declaration to that effect, but in any case the matter will be referred to the trustees to reconsider the sale or appropriation of securities to meet the plaintiff's legacy or some part thereof on the principles I have explained as being those which, as it seems to me, are properly applicable to the case.

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[1916 K. 194.]

Trading with the Enemy—Company—Debenture-holders' Action—Winding up of Business by Board of Trade—Application for Appointment of Receiver and Manager—Pending Proceedings before Board of Trade—Duty to inform Court—Appointment of Controller—Effect on Floating Charge—Removal of Receiver and Manager—Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), s. 1, sub-ss. 1, 2, 3, 4, and 7.

Where a company has issued debentures which are secured by a floating charge on its undertaking and assets, and subsequently an order is made by the Board of Trade under s. 1 of the Trading with the Enemy Amendment Act, 1916, to wind up the business of the company, the order enables the controller to deal with the whole of the assets of the business notwithstanding the debenture-holders' charge and the appointment of a receiver and manager in their action.

On an application for the appointment of a receiver and manager in a debenture-holders' action the Court ought to be informed whether any proceedings before the Board of Trade for the winding up of the business of the company under s. 1 of the Act of 1916 are pending or threatened, and any order made will be at the risk of the parties to it if it is obtained without such information having been supplied.

MOTION.

This was an application by the defendants, Kastner & Co., Limited, by James Henry Stephens, the controller appointed by order of the Board of Trade dated June 26, 1916, in pursuance of s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916, to supervise the carrying out of the order and to conduct the winding up of the business of the defendant company, (1.) that it might be declared that no further steps could be taken in the action by the plaintiffs except with the consent of the Board of Trade, and accordingly (2.) that the action might be stayed, and/or (3.) that Percy Mason, the receiver and manager appointed by an order dated June 22, 1916, might be discharged from being such receiver and manager, and, alternatively, from being such manager, and/or (4.) that, notwithstanding the order of June 22, 1916, H. J.

Stephens as such controller might be at liberty to enter into possession of the property and assets of the defendant company comprised in and subject to the securities and charge created by the B mortgage debentures of the defendant company, and that P. Mason might be ordered to withdraw from possession of the property and assets and to pay over to J. H. Stephens as such controller the cash balance in his hands as such receiver and manager.

The following statement of facts is taken from the written judgment of Younger J. :—

“The action is an ordinary action claiming debenture-holders’ usual relief, commenced on March 31, 1916, by the plaintiffs on behalf of themselves and all other the B mortgage debenture holders of the defendant company. The present application raises important questions as to the extent to which the rights and remedies of the holders of such debentures are affected by an order for winding up the business in the United Kingdom of the company which issued them made in pursuance of the Trading with the Enemy Amendment Act, 1916. Of the B debentures, with which alone the action is concerned, debentures representing 43,065*l.* have been issued, and upon them the sum of 29,500*l.* is now outstanding. The debentures, I understand, are in the usual form, charging by way of floating security the whole undertaking of the defendant company with the repayment of principal and interest. They are not secured by any trust deed or other form of legal charge. When the action was commenced neither principal nor interest was due upon the debentures. Doubtless its institution was due to the taint of enemy character which attached to the defendant company, and it was, I doubt not, for that reason that on May 12, 1916, the plaintiffs moved for the appointment of a receiver and manager on the ground that the security comprised in their debentures was in jeopardy. That motion was strenuously opposed by the defendant company and was refused, without prejudice, however, to a further application by the plaintiffs if circumstances should alter. On April 1, 1916, Mr. Stephens, the present controller, pursuant to s. 12 of the Trading with the Enemy Act, 1914, was appointed by the Board of Trade to be supervisor of the company’s business, and on June 2 the company was summoned to appear before the

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YOUNGER J. Advisory Committee of the Board of Trade to show cause why the business of the company should not be wound up under the Act of 1916. By arrangement the hearing of that matter was adjourned until June 21. In the meantime, on June 19, the plaintiffs, by special leave, gave short notice of motion returnable on the following day for the appointment of a receiver and manager. Even at this date no principal or interest was due or payable in respect of the debentures. No evidence was filed in support of the motion, but on June 20 the company appeared and consented to an order being made for the appointment of Mr. Percy Mason as receiver and manager of the property and assets comprised in and subject to the B mortgage debentures, and Mr. Mason was given liberty to act at once. The formal order was drawn up and dated June 22. It is common ground that the Court was not, when the order was asked for, informed by the company of the pending proceedings before the Board of Trade, although it does appear that on the following day Mr. Mason's appointment was relied upon by the company before the Board of Trade Committee to show that an order for winding up the business was no longer necessary, as Mr. Mason was then in possession of the assets and undertaking of the company with a view to their being carried on and realized under the direction of the Court. The committee, however, decided to advise that an order should be made for winding up the business of the company in the United Kingdom, and on June 26, 1916, the order for that purpose already referred to was duly promulgated by the Board of Trade.

“Since the date of his appointment Mr. Mason, as receiver and manager, has been in possession of the property and assets of the company, and it is in these circumstances that the present application is made to the Court with the view, at the instance of the controller, of displacing him from that position.”

The consent to the appointment of Mason as receiver and manager was given by the company without consulting the supervisor. In the course of the argument the question was raised whether the motion should not proceed on the ground that the appointment of the receiver was collusive on the part of the company in order to prejudice the controller, but after discussion it was agreed that the motion should proceed on the general ground

of the right of the controller to have control of the property of the company, and that if not successful on this point the motion should stand over for further evidence of the circumstances in which the receiver was appointed.

Gore-Browne, K.C., and *Austen-Cartmell*, for the motion. The provisions of s. 1 of the Trading with the Enemy Amendment Act, 1916 (1), are very wide, and confer upon the controller an absolute power to deal with the business. The policy of the Legislature was that a business owned or controlled by enemy subjects should be wound up unless the Board of Trade saw reason to the contrary. In order that there should be no evasions the Legislature has directed that the winding up should be carried out by an officer of the Board of Trade, the controller. By sub-s. 2 of s. 1 the controller is given a first charge on the assets of the business for his costs, charges, and expenses, and is placed in the position of a first mortgagee of the assets. His duty under the sub-section is "to conduct the winding up of the business." Sub-s. 3, which deals with the distribution of the sums and other property resulting from the realization of the assets of the business, shows by implication that the controller is to wind up the business and get in the assets notwithstanding there are secured creditors. Even where a business is being carried on by a receiver on behalf of debenture-holders the Court will, if satisfied that it is being carried on for the benefit of enemy subjects, order it to be wound up. Sub-s. 3 does not contemplate a sale by a receiver. The receiver might sell the business to some one else—possibly so as to be under enemy control—and the business might never be wound up. But by sub-s. 7, where an order has been made appointing a controller, a receiver is prevented from taking any steps to enforce the rights of the debenture-holders without the consent of the Board of Trade. The Act ignores the equitable rights of debenture-holders and enables the controller to sell the assets of the business notwithstanding their charge. The effect of a sale is to transfer the charge of the debenture-holders to the proceeds of sale. It is admitted that where real estate belonging to a company is subject to a legal mortgage the controller cannot make a title to it on a sale, but that does not prevent him

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(1) See note on p. 402, post.

YOUNGER J. from winding up the business of the company. It is not necessary to affirm that he can sell the real estate free from the charge.

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Clauson, K.C., and *J. E. Harman*, for the plaintiffs in the debenture-holders' action. It is submitted that the Act was never intended to interfere with the rights of debenture-holders or mortgagees of a business where they are British subjects. Under sub-s. 2 the controller is placed in a similar position to that of a liquidator of a company, and the sub-section contains a special provision giving him a first charge on the assets for the payment of his costs, charges, and expenses. The Legislature, in making this provision, was familiar with the fact that the costs of a liquidator may in some cases have priority over the charge of the debenture-holders: Buckley on the Companies Acts, 9th ed. p. 398. It is suggested that the preferential payments referred to in sub-s. 3 include payments to mortgagees, but it is submitted that that is not so. The controller has no money with which to pay secured debts; he is only entitled to the equity of redemption in the property. The sub-section deals specifically with preferential payments, and that is entirely inconsistent with the assets being uncharged. Preferential payments are dealt with by s. 107 and s. 209, sub-s. 2 (b), of the Companies (Consolidation) Act, 1908; and see *Strapp v. Bull, Sons & Co.* (1)

[YOUNGER J. referred to *In re Glasdir Copper Mines.* (2)]

It is quite unnecessary to so construe s. 1 as to take away the rights of secured creditors. If the Act had intended to do so it would have done it in plain terms. The Act ought not to be construed as a penal Act against British debenture-holders. The object of sub-s. 3 is to direct the controller what he is to do with the assets when he receives them. The object of sub-s. 4 is to throw upon a company's property in Germany the debts due to Germans. There is nothing in sub-s. 7 which prevents a secured creditor from enforcing his proprietary rights against property of the company which is the subject-matter of his security. The sub-section applies to a case in which a judgment against a company has been recovered and prohibits the levying of execution without the consent of the Board of Trade. The whole section is aimed at leaving the controller undisturbed by creditors, and mortgagees need not necessarily

be creditors of the business. The rights of mortgagees can only be taken away by express words or necessary implication. It is for applicants to show that this has been done, and they have failed to do so.

F. G. Enness (*Douglas Hogg* with him), for the first debenture-holders, took no part in the argument.

Gore-Browne, K.C., in reply. The Act is an emergency statute passed in a time of war, and the Court in construing it will consider more closely than in the case of a more deliberately prepared statute the object for which it was passed.

Cur. adv. vult.

1917. Jan. 11. YOUNGER J. read the following judgment:—By an order of June 26, 1916, the Board of Trade, in pursuance of s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916, directed the business carried on in the United Kingdom by Kastner & Co., Limited, to be wound up, and the Board appointed Mr. James Henry Stephens controller to supervise the carrying out of the order and to conduct the winding up.

This was a motion by Mr. Stephens in the name and on behalf of Kastner & Co., the defendant company in the action, for a declaration based on s. 1, sub-s. 7, of the same Act that no further steps can be taken in this action by the plaintiffs except with the consent of the Board of Trade, and for alternative relief on the footing of that declaration. [His Lordship stated the facts as above set out and continued:]

Now it is manifest from the facts as I have stated them that it may in this case be a serious question whether the circumstances under which the order appointing Mr. Mason was made are not in themselves sufficient to justify the Court in discharging it. These circumstances, however, have not on the present occasion been fully explored for the reason that it was desired by both parties that the question at issue between them should, in the first instance at least, be determined on general principles, leaving it to the controller, if these were not enough for him, to apply subsequently, if so advised, to discharge the receiver and manager on any special grounds which might seem to him sufficient. It is, however, right I should state now that the plaintiffs assure me, and I have no

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reason to doubt their assurance, that so far as they and their legal advisers are concerned their position in relation to the order appointing the receiver and manager is in no way open to criticism. It is also right I should state that in future, when any such orders are applied for, the Court will expect to be informed whether any proceedings before the Board of Trade for the winding up of the business of the company in question are actually pending or threatened, and any order for the appointment of a receiver or manager will be taken at the risk of those who are parties to it if it is obtained without such disclosure having been made.

Dealing now, on general grounds, with the controller's application, one can feel no surprise that it was strongly resisted by the plaintiffs. By the appointment of a receiver and manager, as they said, their floating security had in this case crystallized before any winding up of the business had commenced and before the controller had been appointed. To the extent of their security the business of the company had, they urged, before the winding up order was made in effect become their property. They were, as they said, neither parties nor privies to the Board of Trade proceedings, and it was, they contended, contrary to all principle that the winding up of what belonged to the company should displace proprietary rights which had already become theirs by title paramount or should affect the competence of any proceedings instituted by them for their enforcement. Even an order of the Court winding up the company itself, except that leave to proceed, granted as a matter of course, would formally have to be asked for, would not, they pointed out, interfere with or affect the continuance or even the institution by them of an action to enforce their security. Was it to be held that an administrative order of a Government department, made in their absence, deprived them of their privileges as secured creditors hitherto so jealously safeguarded both by the Legislature and the Courts?

To these propositions, so stated, no exception can be taken; to all of us, permitted hitherto in time of peace to stand in the ancient ways, they are self-evident. The question, however, whether they apply at all, and if so to what extent, to this emergency legislation passed in time of war can only be determined by reference to the terms of that legislation itself. I have

already, in *In re Hagelberg Aktien-Gesellschaft* (1), had occasion to refer in detail to the provisions of this Trading with the Enemy Amendment Act, 1916, and have there drawn attention to the somewhat unusual character of many of its provisions. It will accordingly suffice if in this judgment, without again reading them at length, I refer to those provisions in order that we may ascertain the extent to which the Act has, as an incident of any order thereby authorized, interfered not only with the proprietary but what may be described as the outside interests in the business affected. And first of all it would appear upon the literal construction of s. 1, sub-s. 1, of the statute that the circumstance which attracts the jurisdiction conferred upon the Board of Trade to deal in the prescribed manner with a business in the United Kingdom is that it is "carried on wholly or mainly for the benefit of or under the control of enemy subjects." If it is so under control it is, in terms, unnecessary—for the condition is alternative—that any enemy subject should derive any benefit from its being carried on, from which it would follow that the Act may apply even to a business which belongs, as a question of property, entirely to British, allied, or neutral subjects. And this conclusion does not rest alone upon the clause just referred to. It is not elsewhere a term of the sub-section that the business affected shall belong to the person, firm, or company therein described; it is enough that that person, firm, or company carries it on.

Now, it must be agreed that it is strange, if the relation to the business of the person, firm, or company in a proprietary sense is, so far as the sub-section is concerned, so non-essential, that it is, nevertheless, against that person, firm, or company, and not, as one might have expected, only against that person, firm, or company, being the actual owners of the business, that proceedings may not, under s. 1, sub-s. 7, after order made, be taken without the consent of the Board of Trade. I have already, in *In re Hagelberg Aktien-Gesellschaft* (1), referred to the effect and range of this last sub-section on any view of it. But apart from all such considerations I do not see how, as matter of construction, I can properly from the generality of that sub-s. 7 read into sub-s. 1 a

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condition not there to be found. The true view possibly is that as the person, firm, or company carrying on the business would, in the vast majority of cases, be the owner, as in the present case the defendant company is, Parliament did not consider it necessary in this emergency legislation specifically to deal with the rare case where he or they did not stand in that relation to it. But be that as it may, the result, I agree, is to empower the Board of Trade, by departmental decree, to control, restrict, or even destroy a business in this country in which no enemy subject has any proprietary interest, from the carrying on of which he derives no benefit, and the whole property in which may be British, allied, or neutral. And if such a result, extending as it does to the entire proprietary interest, be within the range of the statute, one need hardly feel surprised if one finds that the normal, if exceptional, privileges of secured creditors of such a business have not been specially preserved in the subsequent provisions of the Act.

And these provisions, consequential as they are both upon an order prohibiting the person, firm, or company referred to from carrying on the business except for the purposes and subject to any conditions therein specified, and upon an order requiring the business to be wound up, appear to me very clearly to indicate that the business to which the order relates, with all its assets and with all claims upon those assets, whether of creditors or owners, is treated by the Act as a *unum quid*—a sort of statutory plague spot which is either to be localized or removed. Although the business need not belong to a company, the powers that may be conferred upon a controller are all expressed in the terms of the powers of a liquidator. They are to be such powers as are exercisable by a liquidator in the voluntary winding up of a company, including power in the name of the person, firm, or company (possibly where the business belongs to such person, firm, or company) or in his own name (possibly where it does not), and by deed or otherwise, to convey or transfer any property, or those powers subject to such modifications, restrictions, or extensions as the Board think necessary or convenient for the purpose of giving full effect to the order. These words are certainly wide enough to enable the Board of Trade to confer upon the controller the fullest powers of management and disposition, and the order in the

present case confers such powers on Mr. Stephens. And that the position of secured creditors is not only not forgotten but is remembered and provided for is shown by the provision that all the costs and expenses are to be defrayed out of the assets of the business and are to be charged on such assets in priority to any other charges thereon. And that the claims of secured creditors of the business are brought under the administration of the controller is also very clearly shown by the provision of sub-s. 4, which, dealing with the assets of the business in enemy territory, requires the controller to cause an estimate to be prepared of the value of those assets and "also of the liabilities of the business to creditors, whether secured or unsecured, in enemy territory . . . and such liabilities . . . shall, for the purposes of this section, be deemed to have been satisfied out of such assets so far as they are capable of bearing them, and the balance (if any), of such liabilities . . . shall alone rank for payment out of the other assets of the business"—a plain indication, as it seems to me, that provision is being made by the statute not only for the ranking but also for the satisfaction of secured liabilities, and for the satisfaction of these last liabilities by the controller himself.

And these provisions of sub-s. 2 and of sub-s. 4 give point to the provisions of sub-s. 3 which apart from them might be regarded at best as colourless, if not, as was contended, even as excluding the claims of secured creditors. Under that sub-section the distribution of any sums or other property resulting from the realization of any assets of the business is first to be subject to the same rules as to preferential payments as are applicable to the assets of a company which is being wound up, and then the sub-section goes on "and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct." Now every provision of the sub-section appears to me to confirm the view that all the assets of the business, whether subject to charges or not, are placed under the administration and disposition of the controller. First of all there is no limitation upon

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the assets to be distributed. They are "any sums or other property resulting from the realisation of any assets of the business," and those assets are, as appears from the concluding words of the first paragraph of sub-s. 2, the assets irrespective of charges. Next the preferential payments that out of those assets are first to be made are payments which by ordinary statute law do rank in priority to debenture-holders; next the assets to go amongst the unsecured creditors are only those which are available for unsecured debts, words sufficiently apt, if, I agree, deficient in emphasis, to leave all assets not so available to go to those by law entitled to them, e.g., secured creditors. Finally the ultimate surplus, being the surplus after providing for the discharge of liabilities,—not, be it noted, the discharge of unsecured debts, and necessarily including the costs, charges, and expenses referred to in sub-s. 2, which are to come before secured debts—is to be distributed amongst the persons interested, that is to say, the persons described in sub-s. 4 as those with claims as distinct from those who are creditors secured or unsecured.

In truth I find in these sub-sections that the controller in a winding-up, being placed in possession of the whole of the assets of the business, is directed to realize and distribute them amongst creditors, secured and unsecured, according to their respective interests except as expressly varied by the Act.

And that this statutory position, with the whole arrangement as to costs and expenses, does not vary much from one very frequently adopted by debenture-holders as a matter of convenience for themselves where they have been content to leave their interests in the hands of the liquidator in a winding up is shown by the following passage from Buckley on the Companies Acts, 9th ed. at p. 398: "Where there are incumbrancers, such as holders of debentures giving a charge upon the property of the company, or equitable mortgagees of property of the company, and the property is realized in the winding-up, the liquidator's costs, charges, and expenses of the realization are first payable out of the fund, and then the principal and interest, and the costs of application, in the matter of the winding-up, of the incumbrancers." The same principle will be found applied in such cases as *Strapp v. Bull, Sons & Co.* (1)

But if any real doubt remain as to the position of secured creditors after a consideration of these sub-sections, it is, I think, resolved by the provisions of sub-s. 7 on which this motion is really based. That sub-section provides that where an order under sub-s. 1 has been made, amongst other things, no "steps for the enforcement of the rights of any creditors of the person, firm, or company" shall be "taken, without the consent of the Board of Trade." I have already referred to the sub-section for another purpose. I refer to it now in order to point out first of all that the creditors controlled are "any creditors," an expression which must as matter of construction include creditors secured as well as creditors unsecured, if only for the reason that secured creditors have already been expressly mentioned in a relevant context in sub-s. 2 and in sub-s. 4 of the same section. Further, no step for the enforcement of the rights of such creditors is to be taken without the consent of the Board of Trade, and it would, I think, be difficult to find a general phrase more apt to include within it both an application to appoint a receiver or manager at the instance of debenture-holders and any further step in an action pending for the realization of their security by and through such a receiver and manager if already appointed.

Now the consent of the Board of Trade had not prior to the service of this notice of motion been given to the taking of any further steps in the action. The company, through the controller, applying under sub-s. 7, which secures that priority of place under the earlier sub-section conferred upon him, is therefore, I think, entitled to the declaration which is sought, and as a consequence I must discharge the order appointing Mr. Mason manager and must direct him to withdraw as receiver from possession of the business property, pass his accounts, and hand over to the controller any balance in his hands representing assets of the British business.

The Board of Trade assenting, it will be convenient that Mr. Mason's appointment as receiver should stand as regards any assets comprised in the debenture-holders' security beyond those of the British business of the company to which the winding up order alone relates, and also to receive on account of the debenture-holders any proceeds of realization which may in the winding up be ultimately available for them.

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It may also be desirable, the Board of Trade not objecting, for the plaintiffs to proceed to a judgment which will direct the taking of the usual accounts and inquiries, with liberty, with the consent of the Board of Trade, to make any application for the realization of the property or any part of it comprised in the security. It may be very convenient for all parties that the machinery of the Court in the action should be utilized for this purpose.

The costs of all parties of this application as between solicitor and client will be paid by the controller out of the business assets and charged thereon as provided by s. 1, sub-s. 1, of the Act.

In this case I have dealt only with the Act as it applies to creditors with an equitable charge upon the assets. It is unnecessary that I should express any opinion, and I express none, as to the rights of the controller over the legal estate in property outstanding in secured creditors or trustees on their behalf.

Solicitors: *Herbert Reeves & Co.; Donald McMillan & Mott; Mayo, Elder & Co.*

NOTE.—Trading with the Enemy Amendment Act, 1916, s. 1, sub-s. 1 :
“Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of the members of that firm or company or any of them, or otherwise, carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—

“(a) prohibiting the person, firm, or company from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the order; or

“(b) requiring the business to be wound up.

“The Board of Trade may at any time revoke or vary any such order, and may, in any case where they have made an order prohibiting or limiting the carrying on of the business, at any time, if they think it expedient, substitute for that order an order requiring the business to be wound up.”

Sub-s. 2 : “Where the Board of Trade make any such order they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business, and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding-up of a company (including power

in the name of the person, firm, or company, or in his own name, and by deed or otherwise, to convey or transfer any property, and power to apply to the High Court or a judge thereof to determine any question arising in the carrying out of the order), or those powers subject to such modifications restrictions or extensions as the Board think necessary or convenient for the purpose of giving full effect to the order, and the remuneration of and costs, charges, and expenses incurred by the controller, and any remuneration payable and costs, charges, and expenses incurred in connection with the supervision or inspection of the business, whether before or after the passing of this Act, to such amount as may be approved by the Board, shall be defrayed out of the assets of the business, and shall be charged on such assets in priority to any other charges thereon.

"In England and Wales an official receiver may, if the Board of Trade think fit, be appointed controller."

Sub-s. 3: "The distribution of any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct:

"Provided that any sums or other property which had a state of war not existed would have been payable or transferable under this section to enemies, whether as creditors or otherwise, shall be paid or transferred to the custodian under the Trading with the Enemy Amendment Act, 1914, to be dealt with by him in like manner as money paid to him under that Act."

Sub-s. 4: "Where there are assets of the business in enemy territory, the controller shall cause an estimate to be prepared of the value of those assets and also of the liabilities of the business to creditors, whether secured or unsecured, in enemy territory, and of the claims of persons in enemy territory to participate in the distribution of any balance available for distribution, and such liabilities and claims shall, for the purposes of this section, be deemed to have been satisfied out of such assets so far as they are capable of bearing them, and the balance (if any), of such liabilities and claims shall alone rank for payment out of the other assets of the business. A certificate by the controller as to the amount of such assets, liabilities claims and balance shall be conclusive for the purpose of determining the sums available for discharging the other liabilities and for distribution amongst other persons claiming to be interested in the business:

"Provided that nothing in this provision shall affect the rights of

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1917 Sub-s. 7: "Where an order under this section has been made as respects the business carried on by any person, firm, or company, no bankruptcy petition or petition for sequestration or summary sequestration against such person or firm, or petition for the winding up of such company, shall be presented, or resolution for the winding up of such company passed, or steps for the enforcement of the rights of any creditors of the person, firm, or company taken, without the consent of the Board of Trade, but the Board of Trade may present a petition for the winding up of the company by the Court, and the making of an order under this section shall be a ground on which the company may be wound up by the Court."

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SARGANT J. *In re* COMMONWEALTH OIL CORPORATION, LIMITED.

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PEARSON v. SAME COMPANY.

Jan. 16, 17.

[1911 C. 3749.]

Practice—Costs—Taxation—Assessment of Gross Sums—Company—Debenture-holders' Action—Notice of Judgment—Scheme of Arrangement—Notices of Meetings—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120—Rules of the Supreme Court, 1883, Order LXV. r. 8, r. 27, sub-r. 38A, and Appendix N, Heads 28, 34, 41, 42, 43, 51, 52, 53.

The Rules of the Supreme Court, 1883, as to the costs of preparing and sending out notices, do not, expressly or by analogy, apply to (a) notices of judgment in a debenture-holders' action, or (b) notices of meetings of creditors and members of a company to agree to an arrangement under s. 120 of the Companies (Consolidation) Act, 1908.

The Directions of the Chancery Division Judges of May, 1896, do not prescribe merely a new mode of "service" of a judgment in an ordinary debenture-holders' action, but substitute the sending of notices of the judgment for service thereof.

In the case of the notices of judgment and of meetings aforesaid the taxing Master may, under Order LXV., r. 27, sub-r. 38A, assess the costs thereof at gross sums, and in that sub-rule the words "other cause" are not to be read as ejusdem generis with those matters which are expressly mentioned in the sub-rule, but the taxing Master may act on the sub-rule in cases where no misconduct or negligence on the part of the solicitors whose costs are being taxed is imputed.

In re Johnston [1904] 1 Ch. 132 explained.

THIS action was commenced in 1911 by one Pearson, on behalf of himself and all others the holders of the 5½ per cent. debentures of the company and of the debenture stock of the company entitled to

the benefit of certain trust deeds, the defendants being the company and the trustees of the deeds. By the judgment in the action, on March 16, 1912, the Court declared that the holders of the debentures and stock, according to their respective priorities, were entitled to a charge on the company's undertaking, and present and future assets, to secure principal moneys and interest, and ordered that the trusts of the deeds should be carried into execution, and that the usual accounts and inquiries should be taken and made. On April 23, 1912, the Master directed the usual course to be taken of serving the debenture and stock holders with notice of the judgment by post. Notices were accordingly printed by the plaintiff's solicitors, whose signature and address were printed at the foot of the notices. The notices—all in the same words, except as regarded the names of the noticees and the amounts of debentures and stocks included in the lists of holders left at chambers (which were in blank)—fixed a date for production of the debentures and stock certificates at the judge's chambers, and also requested the noticee to state the name and address of his transferee if any, and stated that the debentures and stock certificates might be sent by post to the plaintiff's solicitors. On April 7, 1913, an order was made on an originating summons taken out by the plaintiff, intituled in the matters of the company and the Companies (Consolidation) Act, 1908, ss. 120 and 146, and in the action, that the plaintiff should convene separate meetings of (1.) holders of first mortgage debentures, (2.) holders of second mortgage debenture stock, (3.) unsecured loan creditors, (4.) holders of preferred ordinary shares, (5.) holders of deferred ordinary shares, and (6.) an extraordinary general meeting of the company to consider, and if thought fit to approve, with or without modification, a certain scheme of arrangement under s. 120 of the Act of 1908. These notices were printed and sent out by post by the plaintiff's solicitors. The scheme was approved and confirmed by the Court, but fell through. A new scheme was then prepared, and by an order dated July 29, 1914, made on another originating summons by plaintiff in the same matter, and also intituled in the action, the plaintiff was again ordered to convene similar separate meetings and an extraordinary general meeting of the company. These notices were also printed and sent out by post by the plaintiff's solicitors. The second scheme was approved and confirmed by the

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SARGANT J. Court and was being carried out. By an order made in the action on

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January 11, 1916, it was ordered that it should be referred to the taxing Master to tax, as between solicitor and client, (*inter alia*) the costs, charges, and expenses in the action of the plaintiffs and the defendants (other than the company), and the costs, charges, and expenses of the plaintiff and the defendants (other than the company) "of and incidental to the two schemes of arrangement."

In their bills of costs the plaintiff's solicitors charged for "1149 copies of the notice of judgment for service, folios 16 each = folios 13, 248*l.* 19*s.*, and 1149 services thereof by post at 1*s.* 6*d.* each, 86*l.* 3*s.* 6*d.*, making together 335*l.* 2*s.* 6*d.*" The taxing Master allowed only 65*l.* in respect of these two items, and in their objection to this ruling the solicitors said that the notice of judgment was given under Order XVI., r. 40, and that the items were properly chargeable under Appendix N (referred to in Order LXV., r. 8), heads 28, 34, 51, 52, 53, and were not otherwise provided for. They also added that the allowances under Appendix N were the "irreducible minimum," that the "notice of judgment was printed for convenience and not according to the rules of the Court," and that "the charges for copies for service are strictly in accordance with the rules as to printing and consequently are properly chargeable at 4*d.* per folio, the solicitor paying the printers' bill." In respect of the notices as to the first scheme, to debenture-holders and others, the solicitors charged at 4*d.* a folio for preparing and 1*s.* 6*d.* each for service, making together 804*l.* 13*s.* 10*d.*, but the taxing Master only allowed 150*l.* for these items. The solicitors in their objection again relied on Appendix N, and on the last objection to the taxation of costs of notice of judgment. Similar charges (460*l.* 7*s.*) were made as to other notices and taxed at 90*l.*, and the same objections were taken to this reduction. As regarded the notices in respect of the second scheme, the solicitors, on the same lines, charged sums amounting to about 642*l.* and 322*l.*, which the taxing Master reduced to 215*l.* and 95*l.* Similar objections to this were taken, and the objections ended with a general objection that the taxing Master had no power or discretion under the existing rules and appendices to reduce the charges or to allow, "as he has done, a quantum meruit," and that he was bound by Appendix N, and that in the alternative the amounts allowed were "not sufficient quantum meruit allowances."

The taxing Master's answer to the objections to his taxation were SARGANT J. as follows : " These objections proceed on the assumption that the work charged for comes within Nos. 51, 52, 53, and 28 and 34 of Appendix N, and that the charges made are the irreducible minimum for the work, and that I have no discretion on the subject. I do not agree with this view. The work is not, in the opinion of the taxing Masters, in terms covered by those clauses of Appendix N, or within the contemplation of those clauses, and is therefore to be paid for by reasonable remuneration upon a quantum meruit. The bulk of the work relates to convening meetings of debenture-holders by advertisements and circular notices, with forms of proxy, and so on. It is wholly work of a routine character, not requiring professional skill. Meetings of shareholders and debenture-holders are constantly called by secretaries and others without solicitors' help. The solicitors' charges in this case for printing and posting these notices amount to a little upwards of 2500*l.* Flowerdew & Co., the well-known ' Universal Business Aid People,' and addressing contractors, who are very largely employed for this and similar work, publish the following tariff for this class of work : ' Circulars and envelopes addressed per thousand, from 5*s.* 6*d.* Special quotations for large quantities.' The solicitors charge 1*s.* 6*d.* apiece for merely posting the circulars. They claim this as ' service by post ' of a notice, within Nos. 28 and 34 of Appendix N. It amounts to 75*l.* per 1000, about 750*l.* in all, for putting the circulars in the letter-box, and, though the circulars were printed, they charged them as written copies at 4*d.* per folio, and this for some 1000 copies in all. I have allowed full and liberal remuneration, as on a quantum meruit, for the work done. I therefore overrule the objections."

The answer did not refer expressly to Order LXV., r. 27, sub-r. 38A.

The plaintiff took out an originating summons for a review of the taxation.

Whinney, for the plaintiff. The costs disallowed were properly charged. As regards the notices of judgment, although the costs of serving them may not be specified in Appendix N, sending them out is analogous to the matter specified in head 43 of the Appendix, namely, " preparing or filling up for service in any other cause or matter"—that is, other than proceedings to wind up companies—

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SARGANT J. "each notice to creditors to prove claims." Then head 51 gives a charge of 1s. 6d. "for preparing any necessary or proper notice not otherwise provided for," and head 52 gives a charge of 1s., "or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three." And head 53 gives a charge of 4d. "for each copy for service, per folio, beyond such three." In the Directions of May, 1896, given by the judges of the Chancery Division (Annual Practice, 1917, p. 281), it is stated that "in ordinary cases the judgment in a debenture-holders' action should not be served on the debenture-holders, but they should have notice given to them by circular or letter, or by advertisement if the case so requires." But that only substitutes the cheaper mode of "service" by post for the more expensive mode of personal service.

[SARGANT J. The Directions seem to go further than that, by substituting "notice" of the judgment for "service" of it.]

As to notices generally, head 28 of Appendix N gives a charge for service of notice on a party who has not entered an appearance, and head 34 gives another charge, 1s. 6d. for service "if authorised to be by post," while heads 41 and 42 give charges of 1s. "for drawing notice to be served on contributories or creditors of a meeting, per folio," and 4d. "for each copy of the last-mentioned notice to serve, per folio."

[SARGANT J. Those are notices in proceedings to wind up companies.]

Then head 57 provides that "in proceedings to wind up a company, the usual charges relating to printing shall be allowed in lieu of copies for service, where the fee for copies would exceed the charges for printing, and amount to more than 3l." If none of the charges here made come within these heads, the heads apply by analogy. Order LXVII., r. 2, provides for "service" of "notices" and other documents.

[SARGANT J. This case is not within that rule.]

By Order LXV., r. 27, sub-r. 30, it is provided that "as to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed." The practice heretofore has been to allow all such fees as have here been disallowed.

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[SARGANT J. The work charged for is hardly professional work.] SARGANT J.

It is submitted that, at any rate, the preparing and sending out notices of judgments is professional work. The form of notice in Daniell's Chancery Forms, 6th ed. p. 811, has a very professional appearance. By Order XII., r. 9, notice of appearance may be served personally or by post.

[SARGANT J. Rules as to what is to be done as between a plaintiff and defendant afford no analogy which can be followed in a case like this. Was not the taxing Master really acting under Order LXV., r. 27, sub-r. 38A ?]

In the Annual Practice, 1917, p. 1320, there is a note on that sub-rule that "the 'other cause' must be ejusdem generis with those which are mentioned, and consequently the Master can only apply the regulation where there has been dishonesty or negligence." The authority cited for that is *In re Johnston*. (1)

[SARGANT J. The judgment of Farwell J. in that case does not seem to support that note.]

In the same case Farwell J. held that if a taxing Master proceeded under sub-r. 38A he ought to state in his certificate that he had assessed under it and to give his reasons for doing so, and here the Master does not purport to be acting under the sub-rule.

[SARGANT J. Do you wish the matter to be sent back to the taxing Master to amend his certificate ?]

No. If he has assessed he has not assessed a sufficient amount. [He also referred to the Companies (Winding-up) Rules, 1909, r. 23, and to *Price v. Clinton*. (2)]

H. E. Wright, for the trustees of the debenture stock deed, was not called on as to the costs of the notices of meetings; and he said that there was no imputation of misconduct or negligence against the plaintiff's solicitors, and that, as to the costs of the notices of judgment, his Lordship had taken all the points he had himself intended to take.

SARGANT J. This is a summons to review a taxation of certain costs—in respect of five items—in a debenture-holders' action. Judgment was pronounced in the action, and notices of the judgment were given to the debenture-holders. These notices were very

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(1) [1904] 1 Ch. 132.

(2) [1906] 2 Ch. 487.

SARGANT J. numerous. Then, in the course of the action, a scheme of arrangement was put forward, and notices of the meetings of the various classes of debenture-holders and other interested parties were sent out, the meetings being called to obtain the approval of the scheme and its subsequent confirmation. But for financial reasons that scheme fell through. Then another scheme was put forward, and again meetings were summoned by notices to the debenture-holders and other persons interested. The second scheme went through, and it is now in course of being carried out.

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Therefore I have to deal with five items, namely, the item in respect of the giving of the notice of judgment and the four items with reference to the notices convening the meetings. In respect of all these matters the plaintiff's solicitors have brought in charges based upon their having a right to charge separately in respect of each individual notice sent to each person affected, as if each notice were a step coming under the rules as to litigation, and involving professional skill of some kind.

The net result of that process of multiplication is startling, because the total sums charged for sending out and printing and posting these notices amount to no less than 2560*l.* It is true that the solicitors—appreciating, no doubt, the large amount of these charges—have offered to take something very substantially less, but that is not the question. The question is whether they are entitled to this sum of 2560*l.*, or only to 615*l.* which the taxing Master has allowed them. The actual cost of the printing and posting has amounted to 351*l.*, and under the allowance made by the taxing Master the solicitors would be entitled to 264*l.* profit costs. If the solicitors were entitled to the larger amount which has been charged, they would, after deducting the cost of printing and postage, be entitled, roughly, to 2200*l.* profit costs for sending out these five sets of notices.

As regards sending out notices of the judgment, it is sought to bring the matter within the provisions of the rules as to service. It is admitted that the matter is not strictly covered by Appendix N, as to costs, but it is contended on the plaintiff's behalf that the sending out of the notices of judgment is analogous to the matters specified in head 43 in Appendix N—namely, “preparing or filling up for service in any other cause or matter” (that is, other than proceedings to wind up companies) “each notice to creditors to prove

claims, and each notice that cheques may be received"—because in the particular case of sending out the notices of the judgment to the debenture-holders there were two blanks to be filled up, one for the name of the debenture-holder and the other for the amount of his debenture. I do not think that that makes the matter analogous, because in the matters referred to in head 43 there is, in the case of each creditor, a separate transaction between him and the testator or intestate. The creditor does not form one of a class, and the transaction with him is a perfectly independent one, quite separate from the transaction in regard to any other creditor of the testator or intestate. Therefore there is not in that case any such multiplication of the same subject-matter, over and over and over again, as there is in the present case.

Then it is said that, although this case is only by way of analogy within head 43 of Appendix N, the charge is justified under heads 51, 52, and 53, namely, "51. For preparing any necessary or proper notice, not otherwise provided for . . . 52. Or if special, and necessarily exceeding three folios, for preparing same, for each folio beyond three . . . 53. And for each copy for service, per folio beyond such three" It is said that the Court directed that both the notices of judgment and the notices of the meetings should be sent out, and therefore that all the notices were "necessary or proper" notices within head 51, and that the subsequent heads 52 and 53 applied and justified the charges made in respect of each of those notices.

As regards the question of service of the judgment, Mr. Whinney has referred me to the direction given by the judges of the Chancery Division in May, 1896, which is stated at p. 281 of the Annual Practice, 1917, in these terms: "In ordinary cases the judgment in a debenture-holders' action should not be served on the debenture-holders, but they should have notice given to them by circular or letter, or by advertisement if the case so requires; full discretion being reserved to serve the judgment formally if thought advisable." Mr. Whinney says that the result of that direction is that, instead of the expense of personal service being incurred, there is substituted for it service by post, which is much cheaper. I think that that was not the full effect of the direction, but that it went very much further, and got rid of the necessity of service altogether, and

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SARGANT J. provided that instead of service a notice should be sufficient. There-
 1917 fore I think that there is nothing amounting or equivalent to
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And, with regard to the sending out of the notices generally, as being notices directed by the Court, in my judgment, again, this is something which is not covered by the rules at all, and I do not think that the rules should be applied by way of analogy.

But whether the notices are or are not strictly within the rules, and whether the rules ought or ought not to be applied to the notices by way of analogy, I think that the taxing Master has, in his answers to the plaintiff's objections, really shown that he was prepared to act upon, or had in his mind, the provisions of Order LXV., r. 27, sub-r. 38A, which, so far as material, is as follows: "If upon any taxation it shall appear that the costs have been increased by unnecessary delay or by improper, vexatious, prolix or unnecessary proceedings, or by other misconduct or negligence, or that from any other cause the amount of the costs is excessive having regard to the nature of the business transacted or the interests involved or the money or value of property to which the costs relate, or to the other circumstances of the case, the taxing Master shall allow only such an amount of costs as may be reasonable and proper, and may assess the same at a gross sum." It appears that a notion has got abroad, from a note in the Annual Practice (1917, p. 1320), that *In re Johnston* (1) has indicated that the words "or that from any other cause" in the sub-rule are limited to matters ejusdem generis with the matters mentioned in the preceding words—that is to say, that they only apply where there has been something like misconduct on the part of the solicitor. I do not think that the judgment of Farwell J. in that case lays down or even suggests such a construction, and, looking at the language of the sub-rule itself, I think the suggestion that the words are to be so read is excluded. It seems to me that the draftsman, when he uses the words "or that from any other cause," is making a fresh start, and is expressly including, in the cases where an assessment of a gross sum may be made, any case where such an assessment is proper in consequence of the amount of costs being "excessive" "having regard to the nature of the business

transacted." [His Lordship read the taxing Master's answers and continued :]

I entirely recognize the good sense of those observations, although perhaps the taxing Master has not in precise terms dealt with the matter separately under the two heads under which it should fall—namely, first, the question whether the matter is one within any of the sub-heads of Appendix N, and, secondly, whether, assuming the matter is within those sub-heads, it is a case in which he should exercise his discretion under sub-r. 38A.

Strictly speaking, I ought, perhaps, to refer the case back to the taxing Master and ask him whether he intended to exercise his discretion under sub-r. 38A, assuming that the matters in question fell within any of the sub-heads ; but Mr. Whinney does not wish me to deal with the matter too technically, and it is clear that, if I did send the case back to the taxing Master, with the intimation which I should feel bound to give him that, assuming these matters fell within the particular sub-heads, he would be entitled to exercise his discretion under sub-r. 38A, he would at once proceed to exercise his discretion by allowing only the charges which he has allowed. Therefore I do not think it is necessary to send the case back.

The only part of my judgment that is of any general applicability is this : In the first place I hold that these notices, including the notices of judgment, are not notices that have to be "served" at all in accordance with the rules. And in the next place I hold that sub-r. 38A is not limited to cases of misconduct, but extends to every case in which the taxing Master is of opinion that "the amount of the costs is excessive having regard to the nature of the business transacted, or the interests involved, or the money or value of property to which the costs relate, or to the other circumstances of the case."

By consent the costs of the defendant trustees, as between solicitor and client, were ordered to be paid out of the assets, and the summons was dismissed, his Lordship refusing to allow the plaintiff's costs to be paid out of the assets.

Solicitors for plaintiff : *Slaughter & May.*

Solicitors for defendant trustees : *Light & Fulton.*

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ALDERDALE ESTATE COMPANY v. McGRORY.

Vendor and Purchaser—Open Contract to purchase Land—Specific Performance—Decree—Inquiry as to Title—Objections—Purchaser's Knowledge of incurable Defects—Vendor's Right to adduce Evidence after Decree—Admissibility of Evidence.

Upon an inquiry as to title under an ordinary decree for specific performance of an open contract to purchase land the vendor is entitled to adduce evidence to show that the purchaser, when he entered into the contract, knew of the existence of incurable defects in the title.

Decision of the Vice-Chancellor of the County Palatine of Lancaster reversed.

APPEAL from a decision of the Vice-Chancellor of the Lancaster Palatine Court.

The plaintiffs were the owners of certain land at Droylsden in the county of Lancaster, and had for some time past been selling portions thereof for building purposes. The defendant had bought certain portions of the land, and after considerable negotiation with Mr. J. W. Laughton, one of the directors of the plaintiff company, he signed the following contract, dated April 20, 1915, to purchase the remaining unsold portion of the land: "Bought of the Alderdale Estate Company, Limited, the whole of the land subject to measurement approximately twenty acres at the price of 250*l.* per acre." The defendant having refused to complete the purchase, the plaintiffs brought this action for specific performance of the agreement.

The defendant by his defence denied the existence of any agreement, and pleaded that if he did sign the alleged contract he was at the time, to the knowledge of Mr. Laughton, so drunk that he was incapable of understanding its effect, and the contract was accordingly not binding upon him. He further pleaded the Statute of Frauds.

At the trial the Court declared that the agreement "ought to be specifically performed and carried into execution in case a good title can be made to the estate comprised therein"; and it was ordered that it be referred to the registrar to inquire whether a good title could be made.

In pursuance of the judgment the registrar certified that in

proceeding upon the inquiry directed the defendant raised certain objections to the title of the plaintiffs to the property, in reply to which the plaintiffs proposed to give evidence that the defendant had knowledge of the objections prior to the date of the contract, and the defendant objected to the admissibility of the evidence. The defendant's objections to the title were (1.) that there was a public right of way across part of the land, (2.) that there was a public sewer under it, and (3.) that the vendors had no title to the subjacent minerals. The registrar decided that the plaintiffs were entitled to give the evidence.

The defendant then moved before the Vice-Chancellor to have the certificate of the registrar discharged, and that in lieu thereof it might be declared that the plaintiffs were not entitled to give the evidence in question. On October 16, 1916, the Vice-Chancellor decided the motion in favour of the defendant, and the plaintiffs appealed.

P. O. Lawrence, K.C., and *Eastwood*, for the appellants. The Vice-Chancellor has decided this case under a false impression. Under an open contract there is an implied term that the vendor must show a good title; but that implication may be rebutted by proving that the purchaser knew at the time of entering into the contract that a good title could not be made: *In re Gloag and Miller's Contract*. (1) What the vendor has to show is a good title "according to the contract." It is necessary, therefore, to construe the contract to find out what it means. In every open contract for the sale of land a condition is implied for a good title. In *Ogilvie v. Foljambe* (2) Sir W. Grant M.R. seems to have treated it as a collateral right given by law: *Ellis v. Rogers*. (3) Whether it is an implied condition or a collateral right of the purchaser is immaterial here.

The Vice-Chancellor seems to have thought that a question of waiver was involved. It is not suggested that the purchaser has waived anything; he never acquired any right under the contract which he could waive. Upon an inquiry as to title after decree in general terms it must be understood that what is meant is a good title according to the terms of the contract; but if the vendor desires to prevent the renewal, under the inquiry, of objections

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(1) (1883) 23 Ch. D. 320.

(2) (1817) 3 Mer. 53.

(3) (1885) 29 Ch. D. 661, 670.

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waived before the action he should establish such waiver at the trial and get it expressly recognized in the decree, for the Court will not under a general inquiry as to title enter into the question of waiver: *Fry on Specific Performance*, s. 1317; *Curling v. Austin* (1); *Upperton v. Nickolson*. (2) When, however, the purchaser denies the existence of the contract there is no principle as to when the point should be raised. It would have been ridiculous for the vendors to have taken their point at any earlier stage.

[WARRINGTON L.J. Sir W. James L.J. in *Upperton v. Nickolson* (3) expressly recognizes the distinction.]

Maugham, K.C., and *Clarkson*, for the respondent. In attempting to adduce evidence at this stage the vendors are seeking to alter the decree which has been pronounced by the Court. Waiver is perhaps not an apt term in this case, but it is used by Sir W. Grant in *Ogilvie v. Foljambe*. (4) It is admitted that there is a difference between the case of knowledge of objections before contract and requisitions after contract waived before decree, but what the vendors are seeking to do here is, after a decree in ordinary form, to adduce evidence that the whole property contracted for cannot be conveyed. After decree it is too late, because there is an implied condition that a good title must be shown. When it is said that it must be a good title "according to the contract" that means "according to the contract in writing."

[WARRINGTON L.J. The vendor is not bound in his pleadings to anticipate objections which the purchaser may raise.]

In *Cato v. Thompson* (5) it was held that evidence that the purchaser knew at the time of the contract of restrictions to which he objected after action could not be admitted to modify the terms of the express contract. After decree it is too late to bring evidence to rebut the implied condition to make a good title. Specific performance of the written contract has been decreed. There is no case in which it has been held that knowledge of objections to title on the part of the purchaser before contract is any answer.

[LORD COZENS-HARDY M.R. referred to *Williams on Vendor and Purchaser*, 2nd ed. p. 203.]

(1) (1862) 2 Dr. & Sm. 129.

(3) L. R. 6 Ch. 442.

(2) (1871) L. R. 6 Ch. 436.

(4) 3 Mer. 53.

(5) (1882) 9 Q. B. D. 616.

That does not apply to the defect in the title as to the minerals. They might be got in. Such a point as this must be raised before decree. It is not a mere question of title; it affects the subject-matter of the contract.

[LORD COZENS-HARDY M.R. The law is stated in the same way in *Dart on Vendor and Purchaser*, p. 121.]

The contract must be performed as it stands. It is too late after decree to adduce evidence. What is said by Sir W. James L.J. in *Upperton v. Nickolson* (1) covers this case.

[No reply was called for.]

LORD COZENS-HARDY M.R. This is an appeal from an order of the Vice-Chancellor in a specific performance action, and it raises a short but important point. The plaintiff company in this action is the vendor of property. A portion of the property in question had been previously bought by the defendant McGrory, who signed the following contract: "Bought of the Alderdale Estate Company, Limited, the whole of the land subject to measurement approximately twenty acres at the price of 250*l.* per acre." That was the whole contract. It is what is called an open contract—that is, a contract not containing any express provision that a good title should be made. Now what is the law as to the nature of the right to a good title in a case where there is no express provision for a good title? It is, I think, taken to be settled in accordance with the opinion of Sir Edward Fry and other authorities that it is an implied term of such a contract that a good title shall be furnished. But it being an implied term, and not an express term, evidence may be admitted to show that the implied term ought not to be relied upon if it can be shown that to the knowledge of both parties there were certain incumbrances—such as restrictive covenants, or a right of way, or that sort of thing—known to both parties to exist, and it was also known that these incumbrances were from their nature and other circumstances irremovable, or practically irremovable. I confess I thought, and I still think, that the law has been so settled for a long time. The case which counsel for the respondent relied upon, *Cato v. Thompson* (2), is a clear authority, in my view, against his

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(2) 9 Q. B. D. 616.

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argument. Sir George Jessel M.R. and Lindley L.J. in that case pointed out the distinction between an open contract and a contract where there is an express provision that a good title shall be made; and they pointed out that, although you cannot give evidence to contradict an express term of the contract, you may give evidence to explain what it was that the parties were really contracting about. I do not propose to go through the different authorities, particularly *In re Gloag and Miller's Contract* (1), *Upperton v. Nickolson* (2), and others. I am content to adopt, as far as I am personally concerned, the statement in Williams on Vendor and Purchaser, 2nd ed. p. 203: "Here we may notice a case in which a purchaser may be obliged to take lands subject to some defect of title or particular incumbrance, without any written stipulation to that effect. Where the vendor's obligation to show a good title is not an express term of the contract, but is merely implied, as in the case of an open contract, it is open to him to prove that the purchaser bought with notice (though given by word of mouth only) that a good title could not be made, either wholly or partially; and the vendor will then be exonerated from showing title to the extent indicated by such notice. But where the vendor has expressly contracted to show a good title, he is not permitted to modify the terms of his written agreement by giving oral evidence of any such notice." It is not altering the written contract by oral evidence at all. It is simply modifying an implied term of the contract, not an express term. I think that in a matter of this kind the Court ought to be extremely careful not to go against what seems to me to be the settled practice and the settled view of conveyancers. The passage in Sir Edward Fry's book is not quite as full as that of Mr. Cyprian Williams, but is exactly to the same effect, and as far as consistent I wish to adopt that statement of Mr. Cyprian Williams, not merely as a statement of a very able and well-known conveyancer, but as an accurate statement, and that which is the law applicable to a case of this kind. Then the question arises in this form: The plaintiffs, the vendors, commenced this action for specific performance. Substantially the defendant's case was, "I was drunk when this contract was entered into,

(1) 23 Ch. D. 320.

(2) L. R. 6 Ch. 436.

and it does not bind me." There was also a plea of the Statute of Frauds. Whether anything was said about that I do not know; at all events, it must have been overruled by the learned judge, otherwise he could not have made a decree for specific performance. No requisitions were made till after the decree. The decree was in the common form: "That the Court doth declare that the agreement of the 20th April, 1915, in the statement of claim mentioned be specifically performed and carried into execution in case a good title can be made to the estates comprised therein." That means that you must have regard to the agreement, to any terms that are expressed there, and also to any terms which are implied by law. Then certain objections to title were taken by the purchaser, who said: "There is a public right of way across the land, there is a public sewer under it, and the minerals are not in the vendors' power." The vendors then applied to adduce evidence to bring the case within the proposition which I have mentioned, to show the knowledge of the purchaser, and the circumstances under which that knowledge was attained, and the statement that the objections to title were practically irremovable. The evidence was not filed, but the learned registrar took the very convenient course of certifying for the purpose of raising the question of the admissibility of the evidence by expressing the opinion that it was admissible, and upon that the matter went to the learned Vice-Chancellor, who took a different view. He seems to have thought that the doctrine as to waiver applied, and if it was a question of waiver of that which was a legal objection to the title, that it ought to be raised before the decree, and the decree ought to be taken subject expressly to that point. But there is no question of waiver here. The purchaser has nothing to waive; the contract itself, having regard to the implied term, excludes any question of waiver. You cannot waive an objection which you are not entitled to take. With respect to the learned Vice-Chancellor, he has confused, I think, two things, the implied term in the contract and the waiver of the legal right. Different considerations apply to those two matters. The judgment of Fry J. in *In re Gloag and Miller's Contract* (1) is perfectly clear and express on that point, and I know no authority whatever to the contrary. I am

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very anxious not to express any view at all as to whether the evidence which may be tendered, and which I think ought to be admitted, will suffice to get over the difficulties which the plaintiffs have to meet. It is for them to prove knowledge on the part of the defendant: they only desire the opportunity of raising their point before the proper Court; and I think the argument that it ought to have been raised in the statement of claim itself is one which will scarcely bear stating. A vendor commences an action for specific performance; he does not state that there is a public right of way, or a private right of way. He says, "You know that perfectly well." It is not to be supposed that the point would be taken on inquiry as to title when the only objection made by the defendant at the trial of the action was that there was no contract at all. It seems to me it would be unreasonable to hold that the plaintiffs' point ought to have been raised in the statement of claim, or before the decree. I think the point was raised at the proper time, and as soon as it conveniently could be. For these reasons I think the order of the Vice-Chancellor must be discharged, and the view taken by the registrar was correct.

WARRINGTON L.J. I am of the same opinion. The plaintiffs are the vendors, the defendant is the purchaser, of a certain plot of land. The judgment in the action declares that the agreement dated April 20, 1915, in the statement of claim mentioned ought to be specifically performed and carried into execution in case a good title can be made to the estate comprised therein, and directs, in common form, an inquiry as to whether a good title can be made to the estate. The question we have to determine is this, whether on the inquiry as to title as stated in the judgment evidence is admissible that as to certain objections as to title which the vendors say they are unable to remove the purchaser had knowledge of the defects at the date of the contract. Now the contract is what is commonly called an open contract, containing no express provision as to the title which the vendor shall be bound to make. The law on the subject is expressed very aptly, I think, in the passage in Mr. Cyprian Williams' book which has been read by the Master of the Rolls, and I do not propose to read it again. The question we have to determine is as to the case which the vendors make,

that the implied term of the open contract can be rebutted because of what happened before or at the time the contract was entered into—whether that can be raised on inquiry as to title. In my opinion it can. The vendors on the inquiry—which is always, though not so expressed, an inquiry as to whether a good title can be made according to the contract—are really seeking to insist on their right to have the title according to the contract, and for that purpose to ascertain what was the contract that the purchaser entered into. The learned Vice-Chancellor has decided against the plaintiffs on the ground that what the vendors are doing is attempting to set up a waiver by the defendant of the particular objection. In my opinion that is not what the vendors are seeking to do at all. What the vendors seek to do is to establish that the purchaser will never under the contract be entitled to raise the objection, not that he has waived an objection which he would but for that waiver be entitled to raise. The distinction between the two cases is expressed very clearly by James L.J. in his judgment in *Upperton v. Nickolson*. (1) Then it was insisted very strongly, with regard to one of the objections, namely, as to absence of title to the minerals, that to admit the evidence would be allowing evidence to be given to vary the written contract. In my opinion that is not so at all. In this case, as well as with regard to the other objections as to the existence of the public right of way and the existence of the public sewer, what the purchaser is really saying is that the vendors are unable to make a good title as to part of the property comprised in the contract. The vendors say that the implied terms of the contract were such that they are not bound to show a good title to that part of the property. I agree that the appeal ought to be allowed.

LAWRENCE J. I am of the same opinion. I desire to walk delicately in the matter of procedure in a specific performance action. I am content to say that I agree with what has been said by the other members of the Court. For myself, I see no objection whatever to admitting evidence of the circumstances under which

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(1) L. R. 6 Ch. 436, 442.

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Solicitors for appellants: *Hyman Isaacs & Lewis.*

Solicitors for respondent: *Slater, Heelis & Co., Manchester.*

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In re TURNER.

KLAFTENBERGER v. GROOMBRIDGE.

[1916 T. 854.]

*Will—Administration—Annuity charged on Real and Personal Estate—
Express Trust—Arrears of Annuity—Acknowledgment in Writing—
Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 1, 25,
40, 42—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57),
ss. 8, 10.*

Where an annuity is charged upon real and personal estate, whether secured by an express trust or not, only six years' arrears of the annuity are by virtue of s. 42 of the Real Property Limitation Act, 1833, and s. 10 of the Real Property Limitation Act, 1874, recoverable against the real estate, and the same limitation applies to the personal estate although there is no direct statutory bar.

A testator, who died in 1863, by his will gave his real and personal estate to trustees upon trust for sale and conversion, with discretionary power to postpone the sale and conversion, and directed his trustees to invest the net proceeds of such sale and conversion and out of the income thereof to pay A. the annual sum of 700*l.* for her life, and, subject thereto, the testator directed his trustees to stand possessed of the trust estate for his children. The testator had some real estate, but the bulk of his property was personalty. His real estate was not sold until 1915. On the death of A. in 1916 considerable arrears of the annuity were due to her, and her executor claimed payment of all the arrears on the ground that, the annuity being charged on the trust estate and secured by an express trust, no Statute of Limitations applied. On summons by the trustees to determine the matter:—

Held, that, by virtue of s. 42 of the Act of 1833 and s. 10 of the Act of 1874, only six years' arrears of the annuity from the death of the annuitant were recoverable against the trust estate.

The principle of *Sutton v. Sutton* (1882) 22 Ch. D. 511 (the case of a mortgage under s. 8 of the Act of 1874 reproducing s. 40 of

the Act of 1833) and of *Henry v. Smith* (1842) 2 D. & War. 381 (a decision under s. 42 of the Act of 1833 with regard to arrears of interest on a judgment debt under the old law) applied. NEVILLE J.

The Irish cases of *Dower v. Dower* (1885) 15 L. R. Ir. 264 and *In re Nugent's Trusts* (1885) 19 L. R. Ir. 140 approved.

Hughes v. Coles (1884) 27 Ch. D. 231 questioned.

Quære : whether *Hunter v. Nockolds* (1849) 1 Mac. & G. 640 is now law.

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Held, also, that there had been no acknowledgment in writing by the trustees, within s. 42 of the Act of 1833, for six years before the issue of their summons, and that after its issue it was not competent for them by any admission in their affidavits to alter the rights of the parties.

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Thomas Turner, who died in 1863, by his will appointed two persons to be the executors and trustees thereof, and devised and bequeathed to them his real and personal estate upon trust for sale and conversion and out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and legacies, and to invest the residue of the same moneys as therein mentioned, and by and out of the interest, dividends, and annual produce of the said investments to pay the clear annual sum of 700*l.* to his wife, Eleanor Turner, during her life by equal half-yearly payments. And the testator declared that "subject and without prejudice to the payment of the said annual sum of 700*l.* so long as the same or any part thereof shall continue payable," his said trustees should stand possessed of the said trust moneys, stock, funds, and securities and the interest, dividends, and annual produce thereof in trust for all his children living at his death who should attain the age of twenty-one years in equal shares. And the testator empowered his trustees to postpone the sale and conversion of his real and personal estate or any part thereof for such period as to them should seem expedient, and directed that until such sale and conversion the rents, interest, dividends, and annual produce of the same should be paid or applied to the person or persons and for the purposes to and for which the interest, dividends, and annual produce of the moneys to arise from such sale and conversion would be payable or applicable under the trusts of his said will.

The plaintiffs were the present trustees of the testator's will, having been appointed in June, 1901.

NEVILLE J. The testator had five children, all of whom survived him and attained the age of twenty-one years.

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Sarah Turner, a daughter of the testator, married one Garrett, and by a post-nuptial settlement dated August 28, 1874, settled her share under the will of the testator upon certain trusts. The defendant Selby was the surviving trustee of this settlement.

Eleanor Turner, the widow of the testator, died in April, 1916, having by her will and a codicil appointed the plaintiffs and the defendant Edward Groombridge her executors, who duly proved the same.

On the death of Eleanor Turner questions of construction arose on the will of the testator and as to arrears of the annuity, and the plaintiffs issued a summons (1.) to determine whether the annuity of 700*l.* was chargeable on the corpus of the testator's estate or on the income of the estate; and (2.) if necessary, an account of the amount of the arrears of the annuity, and administration of the estate by the Court.

The property of the testator comprised both real and personal estate, of which the bulk was personalty. His real estate was not sold until November, 1915, and realized 1100*l.*

The plaintiffs, in their affidavit in support of the summons, stated in paragraph 14 "the income of the estate has never been sufficient to pay in full the annuity of 700*l.* bequeathed by the will to the widow Eleanor Turner, and the trustees have therefore for many years past paid over to her the whole of the income from the securities for the time being representing the testator's residuary estate, such income amounting on an average to about 400*l.* per annum."

On the hearing of the summons the Court held, on the construction of the will, that the annuity was a charge on the corpus of the testator's real and personal estate, and directed an account of the arrears. The question was then raised whether the arrears were to be limited to six years before the death of the annuitant, and the matter stood over for further argument on that point, and also as to whether any acknowledgments in writing of the annuity had been given at any time by the trustees for the time being of the testator's will.

Jan. 12. The summons now came on again.

The plaintiffs in a further affidavit deposed: "2. Since the 23rd day of November, 1916, when it was ordered that part of this action should stand over we have searched amongst the papers to which we had access relating to the trusts of the will of the said Thomas Turner in order to see if we could find any acknowledgments in writing by the trustees of the will of indebtedness to the testator's widow or other conclusive evidence of an admission in that behalf but we have not succeeded in so doing." But they also stated that one of the testator's sons, George Todd Turner, was a trustee of the will from March 24, 1882, to June 4, 1901, and that they had found three letters from him to the testator's widow, all written in the year 1900, in which he enclosed cheques in her favour on account of her income.

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E. Beaumont (for *J. W. Beaumont*, serving with His Majesty's Forces), for the plaintiffs.

Ward Coldridge, K.C., and *Jolly*, for the defendant Selby. This is an annuity charged on real and personal estate and on the proceeds of sale of real and personal estate, but under the power to postpone there was no conversion until 1915. If all the arrears of the annuity are recoverable they will absorb the whole estate and the residuary legatees will get nothing. We say, first, that under s. 42 of the Statute of Limitations, 1833, only six years' arrears are recoverable; and secondly, that there has been no acknowledgment in writing by the trustees to take the case out of the section. Sect. 40 of the Act deals with the corpus of money charged on land and s. 42 with arrears of rent and of interest of money charged on land, and by s. 1 the term "rent" includes "all annuities charged on land," and such arrears are limited to six years where there is no acknowledgment. Then by s. 25, where land or rent is vested in trustees the right to recover only begins to run from the time it is vested in a purchaser for value, but it is submitted that s. 25 is abolished by s. 10 of the Act of 1874, and that the extended right which the annuitant would have had under s. 25 is gone, and the annuitant is in the same position as if there were no trust and she had only an annuity charged on land, and therefore all arrears beyond six years are barred: *Hughes v. Coles* (1); *Williams v.*

NEVILLE J. *Williams*. (1) The case of *Francis v. Grover* (2) illustrates the operation of s. 42 before the Act of 1874 where there is an express trust, and an annuity charged wholly on personal estate is not within s. 42: *Roch v. Callen* (3); *In re Ashwell's Will* (4); but *In re Raggi* (5) decides that an annuity charged on real and personal estate cannot be apportioned between the two estates. There is no direct English decision as to the effect of s. 42 where an annuity is charged on real and personal estate, but the point has arisen in Ireland, and in the cases of *Dower v. Dower* (6) and *In re Nugent's Trusts* (7) it was held that arrears of an annuity charged on real and personal estate were barred after six years, and we ask the Court to have regard to those decisions: *In re Hartland*. (8) The case of *Hunter v. Nockolds* (9) may be cited against us, but it does not apply. It was not a decision under s. 42, but under s. 3 of 3 & 4 Will. 4, c. 42, and was disregarded in *In re Nugent's Trusts* (7): Darby and Bosanquet's Statutes of Limitations, 2nd ed. pp. 168, 194. In *Sutton v. Sutton* (10), which was the case of a mortgage, it was held under s. 40 of the Act of 1833 that where the remedy against the land is barred the remedy under the personal covenant is also barred. This was followed in *Fearnside v. Flint* (11), and in *Henry v. Smith* (12), which was the case of a judgment debt under the old law, it was held that the rights of the judgment creditor for arrears of interest, as against the real and personal estate of his debtor, were equal and co-extensive. It is submitted that the principle of these decisions applies to the present case. From 1848 to 1879 the law was as stated in *Gough v. Bult* (13), but then the Act of 1879 came into operation, and s. 10 did away with the protection of an express trust. Secondly, there has been no acknowledgment to take the case out of s. 42: *Tippets v. Heane*. (14) The letters are more than six years ago, and the payments by the trustees did not keep alive the arrears: *In re England*. (15) Any

(1) [1900] 1 Ch. 152.

(2) (1845) 5 Hare, 39.

(3) (1848) 6 Hare, 531.

(4) (1859) John. 112.

(5) [1913] 2 Ch. 206.

(6) 15 L. R. Ir. 264, 275.

(7) 19 L. R. Ir. 140, 145.

(8) [1911] 1 Ch. 459.

(9) 1 Mac. & G. 640.

(10) 22 Ch. D. 511.

(11) (1883) 22 Ch. D. 579.

(12) 2 D. & War. 387.

(13) (1848) 16 Sim. 1.

(14) (1834) 1 C. M. & R. 252.

(15) [1895] 2 Ch. 829.

acknowledgment by the trustees is ineffectual after the issue of the NEVILLE J. summons, and we are entitled to set up the statute as a defence :

In re Wenham. (1)

Jenkins, K.C., and *Sidney Lamb*, for the executor of the annuitant. It is submitted that no Statute of Limitations applies and that the estate of the annuitant is entitled to be paid all the arrears of the annuity. There is nothing in the Statutes of Limitations to prevent the Court from exercising its jurisdiction to correct mistakes and adjust rights after a number of years in an administration action where there has been no adverse possession or enjoyment of the property by other parties. This is an express trust, and the annuity is charged on the corpus of the estate and is a continuing charge. The trustees have fully performed their duty by paying the whole income to the annuitant during her life, and now they come to the Court to know to whom they are to pay the trust funds. They are still in possession of the trust estate and are administering it, and there has not been any adverse possession or enjoyment by any one, and they cannot set up the statute. It is submitted that the statute has no application where the claim for arrears is, as here, against the trustees and not against any one in adverse possession. Neither s. 40 nor s. 42 of the Act of 1833 refer to a trust. Then s. 25 applies to a trust itself and protects a purchaser for value. That section stands and has not been repealed, and it is still law that an express trustee of land or of the rents and profits of land cannot set up the statute: *Cox v. Dolman* (2); *Burrowes v. Gore* (3); *Watson v. Saul* (4); and s. 10 of the Act of 1874 has no bearing in cases where trustees are in possession of land or the rents and profits of land, but only where trustees are put forward to enforce a charge on land that is in the possession of some beneficial owner. The object of s. 10 is to protect a beneficial owner in possession, so that his position is not worse because a claim is put forward by a trustee. In all the cases cited the resisting party had been in beneficial possession or enjoyment of the property for more than the statutory period, as in *Williams v. Williams* (5) and *Hughes v. Coles*. (6)

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[1892] 3 Ch. 59.

(2) (1852) 2 D. M. & G. 592.

(3) (1858) 6 H. L. C. 907, 961.

(4) (1859) 1 Giff. 188.

(5) [1900] 1 Ch. 152.

(6) 27 Ch. D. 231.

NEVILLE J. [NEVILLE J. referred to *Edwards v. Warden*. (1)]

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There is nothing in s. 10 to prevent a cestui que trust from recovering from his trustee his property that he has got. Assuming that this annuity was a charge on land on the principle of *In re Fox* (2), she could have come to the Court and have asked to have it raised out of capital by a sale or mortgage: *In re Tucker* (3); but we submit she was not bound to do so. If she had, the statute might have commenced to run, and at what stage can it be said that the statute commenced to run?

Secondly, there has been an acknowledgment in writing within the meaning of s. 42. The section says nothing about payment on account. We rely on paragraph 14 of the trustees' affidavit. The cases show that an affidavit made for the purposes of a suit may amount to an acknowledgment, and a mere admission that there are arrears is sufficient: *Blair v. Nugent* (4); *Lord St. John v. Boughton* (5); *Jortin v. South Eastern Ry. Co.* (6)

Lastly, assuming that the statutes apply, we are entitled on the evidence to six full years of the annuity from the death of the annuitant, i.e. 4200l., because the amounts received on account must be appropriated to arrears: *Booth v. Coulton*. (7)

G. M. Hildyard for a party in the same interest.

Ward Coldridge, K.C., in reply. In *Blair v. Nugent* (8) the affidavit had been made some twenty years before in another suit. Here it is made in the present suit where the trustees are asking the opinion of the Court. It is a statement made on behalf of all the beneficiaries and cannot be an acknowledgment binding on any one. The distinction between corpus and income no longer exists where an annuity is charged on land: *Hambro v. Hambro* (9); *In re Young*. (10)

Cur. adv. vult.

Jan. 31. NEVILLE J. The first question which arises here is whether the annuity given by the testator to his widow is charged

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| (1) (1874) L. R. 9 Ch. 495; on appeal (1876) 1 App. Cas. 281. | (5) (1838) 9 Sim. 219. |
| (2) [1913] 2 Ch. 75. | (6) (1854) 6 D. M. & G. 270, 290. |
| (3) [1893] 2 Ch. 323. | (7) (1870) L. R. 5 Ch. 684. |
| (4) (1846) 3 J. & Lat. 658, 677. | (8) 3 J. & Lat. 658, 674. |
| | (9) [1894] 2 Ch. 564. |
| | (10) [1912] 2 Ch. 479. |

upon land within the meaning of 3 & 4 Will. 4, c. 27, s. 42. It is charged upon the proceeds of sale of the real and personal estate, and there is power to postpone the sale of the real estate. It was conceded in argument that I am bound by authority to hold that it is charged upon land within the meaning of the section. The annuitant is now dead, and the question arises whether the arrears recoverable from the estate of the testator are limited to six years by virtue of the section. The point has, I think, been decided in that sense in Ireland in the case of *Dower v. Dower* (1) and *In re Nugent's Trusts*. (2) However, notwithstanding what was said in *In re Harland* (3), English judges are not, I think, entitled to follow decisions in the Irish Courts, although no doubt the reasoning upon which such decisions rests may be of great assistance. I am glad in the present case to have arrived at a similar conclusion to that expressed in the cases just referred to.

In *Sutton v. Sutton* (4) it was held with regard to a mortgage that s. 8 of the Act of 1874 (re-enacting s. 40 of the Act of 1833) limits the personal remedy on the covenant in a mortgage deed as well as the remedy against the land to twelve years. Mr. Macnaghten, as he then was, in that case argued that the section only applied to the recovery of the money by enforcing the charge on the land, and I confess that to my mind there was much to be said for that argument; but the Court of Appeal held otherwise, and Bowen L.J. says, referring to the words of the section, "does that not mean that no action or suit shall be brought to recover any sum of money which is secured by any mortgage?" The words of s. 42 of the Act of 1833 are so like the words of s. 8 of the Act of 1874, which re-enacts s. 40 of the former Act, that I think no distinction can fairly be drawn between them. I think what Bowen L.J. says with regard to s. 8 of the Act of 1874 applies with equal force to the wording of s. 42 of the Act of 1833. In *Henry v. Smith* (5) it was held that under s. 42 the remedy was barred in six years, not only against the real estate, but against the personal estate to the same extent. This was the case of a judgment debt. The Lord Chancellor there says (6): "Then it is said that if it is held that judgments

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(1) 15 L. R. Ir. 264.

(2) 19 L. R. Ir. 140.

(3) [1911] 1 Ch. 459.

(4) 22 Ch. D. 511, 520.

(5) 2 D. & War. 381.

(6) 2 D. & War. 387.

NEVILLE J. are within the 42nd section the creditor will have a more
 1917 extensive right against the personal, than against the real,
 TURNER, estate of his debtor, but I am clearly of opinion, the rights
In re. are in this respect equal, and so far as the bar operates for the
 KLAFFEN- protection of real estate, the personal estate is equally protected.”
 BERGER
 v.
 GROOM- This case, I think, decides the present question, except with regard
 BRIDGE. to this : It is said that here is an express trust not subject to any
 statutory limitation. That this was so prior to the Act of 1874
 appears to have been held in several cases : see *Burrowes v.*
Gore (1), *Blair v. Nugent* (2), and *Ward v. Arch.* (3) I think,
 however, that this matter was dealt with by s. 10 of the Act
 of 1874, and that the recovery of arrears of an annuity charged
 upon land is now limited to six years although secured by an
 express trust.

It is said that here the annuity is not only charged upon land, but
 on the continuing rents of land, and therefore that it is not within
 s. 42. If there be any difference between the two cases (as to which
 see the remarks of Parker J. in the case of *In re Young* (4)), the
 decisions above referred to show, I think, that, if once you find that
 the annuity is charged upon land, all remedies, whether against
 the land or personal estate, are subject to the same limitations.
 I cannot follow *Hughes v. Coles* (5) as reported. Why six years’
 arrears were not recoverable there I do not understand. I have not
 here, however, to consider whether s. 8 of the Act of 1874 affects the
 payment of an annuity which has not been recovered for twelve
 years.

In my opinion there was no acknowledgment within s. 42. I
 think the trustees acted upon the supposition that the annuity
 was payable only out of income of the estate, for the whole of which
 they accounted to the annuitant, and that they could not therefore
 have intended to acknowledge any greater liability. Whether
 this was so or not, I am of opinion that no acknowledgment was
 given within six years from these proceedings. I do not think
 it was competent for the trustees, had they so intended, to alter
 the rights of the parties after the issue of the summons by an

(1) 6 H. L. C. 907, 909.

(3) (1842) 12 Sim. 742.

(2) 3 J. & Lat. 658.

(4) [1912] 2 Ch. 479.

(5) 27 Ch. D. 231.

acknowledgment. I hold, therefore, that arrears for six years only NEVILLE J. from the death of the annuitant are recoverable from the testator's estate.

Solicitors : *Church, Rendell & Co. ; Emmet & Son.*

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Company—Amalgamation—Scheme of Arrangement—“Compromise or arrangement”—Sanction of Court—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120.

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An assurance company presented a petition under s. 120 of the Companies (Consolidation) Act, 1908, for the sanction of the Court to a proposed arrangement for the fusion of the company's interests with those of a marine insurance company, and for the subdivision of its shares in order to carry out the arrangement. The scheme involved that each of the petitioning company's shareholders should contribute a portion of his holding in the company to be transferred to the marine insurance company and its shareholders, and it had been approved by the requisite majority of the shareholders in general meeting.

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Younger J., while approving the scheme as being advantageous to the interests of the company, refused to sanction it on the ground that s. 120 necessarily involved some kind of dispute or difficulty to be resolved by a compromise or arrangement, and that there was none shown to him in the present case :—

Held, on appeal, that the scheme, though not a “compromise,” was an “arrangement” within the section, and that there was no ground for limiting the meaning of the word “arrangement” to something analogous to a compromise.

Decision of Younger J. reversed.

A PETITION was presented by the Guardian Assurance Company, Limited, to obtain the sanction of the Court to a scheme of arrangement with the shareholders under s. 120 of the Companies (Consolidation) Act, 1908. The object of the petitioners, by means of the order which they sought to obtain, was to make the scheme binding upon every individual shareholder of the company whether he had assented to it or not, and the question for the determination of the Court was whether the arrangement was one to which the section applied.

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The Guardian Assurance Company was incorporated in 1821. By its memorandum of association the company was empowered to carry on substantially every kind of insurance business, including expressly the business of marine insurance and underwriters of marine risks of every kind. It was authorized to purchase or otherwise acquire all or any part of the business, property, and liabilities of any company carrying on any business which it is itself authorized to carry on, to amalgamate with any company engaged in any such business, and to take or otherwise acquire and hold shares in and to manage or control or take part in the management or control of any such company and to act as agents or trustees therefor.

The nominal capital of the company was 2,000,000*l.* divided into 200,000 shares of 10*l.* each, all of which had been issued and were paid up to the extent of 5*l.* per share. It was an incidental part of the proposed scheme that all the capital should be subdivided into 200,000 preference shares of 4*l.* each credited as fully paid and 400,000 ordinary shares of 3*l.* each with 10*s.* a share credited as paid thereon. Special resolutions for conditionally effecting that subdivision and attaching to the shares of each class their appropriate rights had been duly passed, and the court was asked by this petition incidentally to confirm and approve such subdivision in pursuance of s. 45 of the Companies (Consolidation) Act, 1908.

The present resources of the company were thus stated in paragraph 17 of the petition: "The company has no debenture debt whatever, and its liabilities consist of its obligations to the holders of policies of assurance and annuities granted by the company and the current expenses of management, wages and salaries. Such current expenses vary from time to time, but upon the average amounted to 19,357*l.* 10*s.* 4*d.* per month in the year 1915. Separate accounts are kept by the company in respect of its life, fire, redemption assurance, employers' liability and accident, burglary and general departments and special funds are allocated to meet the liabilities of the company to its policy-holders in each of these departments including in the case of the life department the liability to annuitants and such special funds are amply sufficient to provide for the liabilities to meet which they are so allocated. The company further keeps a separate fund amply sufficient to meet its liability

in respect of its paid up capital. The assets of the company are more than sufficient to discharge all its liabilities and to provide ample capital for working its business."

Recently, as appeared from paragraph 11 of the petition, the Guardian Company entered into negotiations with the Reliance Marine Insurance Company, Limited, for fusion of the interests of the two companies by what in the petition was described as an exchange of shares, and on October 11, 1916, a conditional agreement was entered into between the Guardian Company and the Reliance Company. The latter company had a nominal capital of 500,000*l.* divided into 50,000 shares of 10*l.* each; all of these shares had been issued, and each was credited with 2*l.* paid. The registered office of the Reliance Company was at Liverpool, and it carries on the business of marine insurance. The position of the Reliance Company was thus stated in paragraph 18 of the petition: "The assets of the Reliance Company amount to about 483,000*l.*, and the profits of that company have for each of the last five years been sufficient to enable it to distribute by way of dividend amongst its shareholders the sum of 80,000*l.*, being at the average rate of 16 per cent. on its paid up capital."

The conditional agreement referred to, together with recitals as to the respective capitals of the two companies and the proposed subdivision of the Guardian Company's capital as above stated, contained this recital: "It is to the advantage both of the Guardian Company and of the Reliance Company that a fusion of their undertakings should be effected by the acquisition by the Guardian Company or its nominees upon the terms hereinafter appearing of the whole of the shares of the Reliance Company, or failing the whole then of at least 80 per cent. of such shares or such smaller proportion as the board of the Guardian Company shall determine." By paragraph 1 of the agreement it was provided as follows: "The Reliance Company shall use its best endeavours to procure the transfer of all the shares of the Reliance Company by the holders thereof to the Guardian Company or its nominees in consideration of (a) the Guardian Company transferring or procuring the transfer to such holders of ordinary shares of the Guardian Company (being part of the 400,000 ordinary shares of the Guardian Company resulting from such subdivision) at the rate of two of such ordinary

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shares of the Guardian Company for each share of the Reliance Company, and (b) the payment by the Guardian Company to such holders of the sum of 10s. in cash for each share of the Reliance Company so transferred." Paragraph 2 was as follows: "The Guardian Company shall forthwith send out through the Reliance Company to every shareholder of the Reliance Company an offer in such form as shall reasonably be approved by the board of the Reliance Company offering to every such holder two of such ordinary shares of the Guardian Company and 10s. in cash in exchange for a transfer to the Guardian Company or its nominees of each share of the Reliance Company held by him. Every such offer and the acceptance thereof shall be made conditional (a) on the approval of this agreement by the Guardian Company in general meeting, (b) on the Guardian Company obtaining the sanction of the Court and/or all such other sanctions and authorities as may be requisite for enabling the aforesaid subdivisions of the existing shares of the Guardian Company and the aforesaid transfer of the ordinary shares of the Guardian Company to be lawfully and effectually carried out, and (c) on holders of at least 80 per cent. of the shares of the Reliance Company or such lesser proportion thereof as the board of the Guardian Company shall determine effectively accepting such offer on or before the 30th day of October, 1916, or within such extended time as the boards of the Guardian and the Reliance Companies shall mutually agree." Paragraph 3: "If this agreement shall not be approved by the Guardian Company in general meeting and the sanction of the Court and/or such other sanctions and authorities as aforesaid shall not be obtained on or before the 15th day of June, 1917, or such subsequent day as the boards of both companies shall agree, or if on or before the 30th day of October, 1916, or such subsequent day as aforesaid the said offer shall not have been effectively accepted by such proportion as aforesaid of the holders of the shares of the Reliance Company this agreement shall be void."

That agreement was unanimously approved by the shareholders of the Guardian Company present at an extraordinary general meeting of the company on October 27, 1916, and the directors were then authorized to take all necessary proceedings and steps both for carrying it into effect and for procuring the sanction by

the Court or otherwise to the arrangement between the company and its members involved in the agreement and for carrying that arrangement into effect.

The directors duly propounded the necessary scheme. A meeting of the members of the company to consider it was duly directed by the Court, and the meeting was held on November 24, 1916. At that meeting thirty-one members of the company holding altogether 2798 shares were present in person, and 1279 members holding altogether 103,892 shares were represented by proxy, and the following motion, which is set out in paragraph 15 of the petition, was duly passed with two dissentients: "That the scheme of arrangement submitted to this meeting be and the same is hereby approved and that the directors be authorized to carry same into effect."

The scheme was accordingly approved by a majority in excess of the statutory requirements, but, while shareholders holding 106,690 shares so approved, shareholders holding 93,250 shares had neither expressed approval nor disapproval of the scheme. The two shareholders holding sixty shares who opposed the scheme at the meeting did not appear upon the petition. The scheme so approved was as follows: "1. That the capital of this company be subdivided into 200,000 preference shares of 4*l.* each credited as fully paid up, and 400,000 ordinary shares of 3*l.* each credited as 10*s.* per share paid up. 2. That of the 400,000 ordinary shares resulting from such subdivision 100,000, or such lesser number as may be actually required for the purpose, be applied in or towards the acquisition by this company for its own benefit of the whole or such lesser number as the directors of the company may determine of the shares of the Reliance Marine Insurance Company, Limited, upon the basis that each shareholder of the latter company who transfers shares in that company to this company is to receive as the consideration for so doing two of such 400,000 ordinary shares and the sum of 10*s.* in cash for each share so transferred by him. 3. That the 100,000 or other lesser number of ordinary shares required for the purpose aforesaid be contributed by the members of this company rateably, but if such rateable contribution would result in a member being left with a fraction of a share, he shall be bound to contribute the whole of such

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share, and such fraction shall, as soon as conveniently may be, be sold for his benefit at such price as the directors may determine.

4. Each member shall, when required by the board of this company so to do, transfer the shares to be contributed by him as aforesaid to such transferee or transferees as the board shall direct, and if he shall make default in so doing this company may cause the name or names of the said transferee or transferees to be entered in the register as the holder or holders of the shares in the place of the name of the defaulting transferor, and after the name or names of such transferee or transferees has or have been entered in the register in purported exercise of the power aforesaid the validity of the proceedings shall not be questioned by any person." Provision was then made for the alteration of the articles of the Guardian Company. Paragraph 6 provided "That every member of this company shall forthwith send in to this company the certificates of his present shareholding in this company and that this company shall so soon as practicable issue to him new certificates of his holding in this company as the same will exist as the result of the foregoing arrangement."

It appeared from paragraph 19 of the petition that "Down to the date of the presentation of the petition holders of 41,292 shares in the Reliance Company have signed an agreement to exchange their shares on the terms set forth in the said conditional agreement and scheme of arrangement; such agreements were conditional on the company obtaining the sanction of the Court and/or other requisite authority to enable the proposed subdivision of its shares and the proposed exchange to be validly carried out and on certain other conditions which have been fulfilled."

Sect. 120 of the Companies (Consolidation) Act, 1908, provides that if a majority in number representing three fourths in value of the members or class of members present either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members.

The petition was heard by Younger J. on January 12, 1917.

Clauson, K.C., Ashworth James, and G. R. Northcote, for the petitioners.

Cur. adv. vult.

Jan. 15. YOUNGER J. (after stating the facts, substantially as above set out, and saying that he felt no difficulty in confirming the proposed subdivision of the Guardian Company's shares under s. 45 of the Act). If I were satisfied that the scheme I have just read were, having regard to the facts as I have above stated them, a compromise or arrangement between the company and its members to which the provisions of s. 120 of the Act applies, I should be prepared to sanction it notwithstanding the unusual character of its provisions and the very large minority of shareholders who have expressed no views at all upon it, for it goes without saying that in all respects the scheme is entirely above suspicion, while the advantages which are promised to the company from the fusion of its interests with those of the Reliance Company which the scheme, if carried out, would effect are highly attractive.

But the question remains whether the scheme is in the circumstances within the Act at all; and as it undoubtedly strains the section to a point beyond any decision upon it known or cited to me, and as the scheme can only be sanctioned by invoking a principle which, if it be permissible to apply it, would greatly extend the operation of the section in future and probably less meritorious cases, this question demands very careful consideration in the interests not only of the large body of shareholders of this company who have expressed no opinion upon the scheme, but also on all shareholders in all companies to which the section applies.

Lindley L.J. in *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1) makes the following observations which are very relevant to the question in debate. "Powers," he says (he is dealing with a clause of a trust deed, but his observations are, I apprehend, equally applicable to such provisions wherever found), "given to majorities to bind minorities are always liable to abuse; and, while full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to strengthen them and make them applicable to cases not included in those which they were apparently intended to meet."

Accordingly, applying Lindley L.J.'s words, I proceed to consider

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Now the salient facts here are that the directors of the Guardian Company quite properly decided some time ago that with a view to the fusion of the two companies it was desirable to acquire for their company, as one of its corporate assets, a preponderatingly controlling holding of shares of the Reliance Company. No contract, however, binding presently upon the Guardian Company to buy or take over these shares or any of them exists. If I may put it in another way, there is no existing liability upon that company to pay for these shares or any of them for the discharge of which the assistance of the shareholders might either properly or necessarily be asked for. Moreover, even if such liability did exist, the company is possessed of ample corporate funds out of which to meet it; and if, as is doubtless the case, it be an essential part of the proposed fusion so far as the Reliance shareholders are concerned that they shall receive in part satisfaction of the price of their shares ordinary shares in the Guardian Company with 10s. paid upon each share of 3*l.*, then there is no difficulty alleged, nor was any suggested, to which regard need be had, in increasing the capital of the Guardian Company, by the number of shares necessary for the service of the transaction and in issuing these shares as partly paid up accordingly. The only difficulty suggested was that Treasury sanction to the increase would have to be obtained.

The directors, however, prefer and propose—and I quite appreciate the reasons which induce that preference—to pay for these shares which the company is to acquire for itself, not, except as to a fraction, with, as would be natural, the company's money, or with the company's shares, but by recourse to the shareholders' own shares in the company already paid for by them, and, the necessary majority of the shareholders concurring in the proposal, the Court is asked to make an order which will bind all the shareholders to give effect to it whether they have agreed thereto or not. Otherwise expressed, the scheme is that every individual shareholder shall out of his own shares in the company find for the company the necessary proportionate part of the capital required to enable it to embark upon a new enterprise from which profit may fairly

be expected; and he is to be bound so to do if, the proposal having been adopted by the prescribed majorities, it is now sanctioned by the Court.

Of course, I quite understand that if the transaction were carried out by means of an increase of the Guardian Company's capital and of an issue partly paid of new shares to the extent necessary to give the shareholders of the Reliance the same proportionate interest in the Guardian Company with its capital so increased, as they would have under the existing scheme, the result would in this case, superficially at least, appear to be the same to the shareholders in the Guardian.

But it is not so in reality. Even if the difference in the nominal amount in their holdings be ignored—and it is common knowledge that for market purposes it would be a mistake to ignore it—the position of the holders of settled shares especially would be very different, for, under the scheme as proposed, assets are being brought into credit without any corresponding liability to share capital or otherwise being brought in against them. The result would bring to the credit of the company's assets a surplus which by means of apt provisions in its articles might be made distributable as dividend, all of which would go to tenants for life. Indeed, the mere book-keeping aspect of the transaction shows how extraordinary the proposal is.

But, further, it is a cardinal principle of the law applicable to a company limited by shares that, just as a shareholder therein cannot by any device escape from his liability to pay in full the nominal amount unpaid upon his shares, so he cannot be called upon to pay to the company's funds more than his agreed contribution in respect of his shares. It would therefore be a remarkable thing to find that any section of the Act authorized a majority of his fellow-shareholders to require, even with the approval of the Court, that same shareholder to return to the company a part of what he had received from it in respect of his statutory obligations, such return being for a purpose which the company could quite conveniently achieve and if so ought assuredly to provide for out of its own corporate funds.

Does, then, the section extend to such a case?

Its history is well known. It is the lineal successor of s. 2 of

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the Joint Stock Companies Arrangement Act, 1870. The section was there applicable only to compromises or arrangements with creditors of a company, and then only if the company was in liquidation. In 1900, by s. 24 of the Companies Act of that year, the earlier section was made applicable not only as between the company and the creditors or any class thereof, but as between the members or any class thereof and the company. The section still applied only when the company was in liquidation. In the year 1907, by s. 38 of the Companies Act of that year, the Act of 1870 was made applicable whether the company was or was not in course of being wound up. Sect. 120 of the new Act is merely a re-enactment of s. 2 of the Act of 1870 as so modified.

Now, the limited purpose which the Legislature had in view in making the section applicable to a going company not in liquidation was well understood at the time the Act of 1907 was passed. It was to render arrangements possible without liquidation in cases where the mere commencement of a winding up would involve a forfeiture of leases, concessions, contracts, and the like, arrangements which before the passing of that Act, if they were to be carried out at all, had to be effected by private Act of Parliament.

It would appear, therefore, that there is attached to the section throughout its history the idea of some difficulty to be resolved by a compromise or arrangement of rights on one side or the other—a situation which before 1907 could only arise in a winding up, and after 1907 would still naturally so arise except in a case where paramount considerations against liquidation were present.

To extend the section to a case like the present where there is no difficulty or doubt of any kind to be resolved, to extend it further so as to include within it a transaction so alien to that cardinal principle of the company law to which I have just referred, would surely be, in Lindley L.J.'s words, "an attempt to make the section applicable to a case not included in those which it was apparently intended to meet."

But Mr. Clauson, in answer to suggestions to the above effect, contended that the language of the section was too general to be by construction restricted in any way; that the word "arrangement" was of the widest possible content, and that it extended to and included every transaction between a company and its members

which directly affected their proprietary rights in their shares. Curiously enough while contending that a scheme under which the consideration for the shareholder's contribution would be received by the company was an arrangement under the Act, he agreed that a scheme under which he would receive it for himself would not, but apart from that concession he challenged me—indeed I am not sure that he did not defy me as his only available opponent—to find any line which would divide a transaction of the description contended for that was an arrangement within the section from one that was not. I feel bound to accept that challenge, because there are possibly two grounds, and there is, as I think, certainly one, upon which this so-called arrangement can be properly held to be outside the Act.

First of all, it is, I think, quite clear that s. 120 does not extend to all arrangements of the kind described by Mr. Clauson. Its relation to other sections of the Act—e.g., s. 45 and s. 192—is, I think, plain. Its purpose is strictly limited: it does not confer powers; its only effect at any time is to supply, by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. The section accordingly has no application to an arrangement which is ultra vires the company, nor to an arrangement of a kind which can only be effected in a prescribed way, e.g., a reduction of capital, or a reconstruction under s. 192. If that which within Mr. Clauson's definition would be an arrangement is in fact nothing but a reduction of capital, the appropriate statutory procedure must be resorted to: *In re Cooper, Cooper and Johnson*. (1) Sect. 120 has no application. So, if it is a reconstruction, the procedure of s. 192 must be followed: see *In re General Motor Car Co.* (2) It will, I think, be found on examination that there is nothing in *In re Canning Jarrah Timber Co. (Western Australia)* (3), nor in *In re Tea Corporation* (4), nor in *In re Sandwell Park Colliery Co.* (5), in conflict with this. In all these cases s. 192 was in substance complied with in the sense that every one entitled to object that it was not either assented or was

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(1) [1902] W. N. 199.

(3) [1900] 1 Ch. 708.

(2) [1913] 1 Ch. 377.

(4) [1904] 1 Ch. 12.

(5) [1914] 1 Ch. 589.

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paid. And there are frequently cases in which an arrangement involves a reduction of capital, and also some alteration in the rights which cannot be effected by the reduction procedure *per se*. In such a case the requirements both of the reduction procedure and this section must be observed. So in the case of a reconstruction, when, for instance, it is desired in the scheme to escape from such a decision as that of *Griffith v. Paget*. (1) In such a case the requirements both of s. 192 and of this section must be followed.

Take another instance of a so-called arrangement outside the section. The sale of the whole undertaking of a company for a consideration to be distributed amongst the members without liquidation is *ultra vires* the company: see *Bisgood v. Henderson's Transvaal Estates*. (2) To such an arrangement this section, even if complied with, would give no validity, because it would be void even if every individual shareholder agreed to it.

Now it is, I think, possible to read this present scheme as one which in fact requires, or at least permits, a surrender of shares to the company in circumstances which would not justify a forfeiture, and such a transaction is *ultra vires* the company: see *Bellerby v. Rowland & Marwood's Steam Ship Co.* (3) It is of course true that the shares of the members taken here are, so far as words go, to be transferred by direction of the company and not surrendered to the company. But the transferee need not be the shareholder in the Reliance Company who is ultimately to get the shares; he may be, and presumably in most cases will be, a nominee or trustee for the Guardian Company pending the ascertainment of the ultimate transferee. If so, the transfer would for the time be nothing but a surrender.

I recognize, however, that this objection to the scheme may, for the reason just suggested, not be open. I proceed, therefore, to the other, which, on the authorities, is less open to doubt.

The words of the section are "any compromise or arrangement." It is not suggested that this scheme is a compromise. A compromise presupposes some dispute about the rights compromised, or some difficulty in enforcing them if dispute there is none. It is agreed there is neither dispute nor difficulty here. It is said, however, that in

(1) (1877) 5 Ch. D. 894. (2) [1908] 1 Ch. 743.

(3) [1902] 2 Ch. 14.

this section "arrangement" covers any transaction whether in the nature of a compromise or not. I do not think this is the true effect of the word in the section. It is true that in *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1) Fry L.J. made the following observations with regard to the word "arrangement." He said: "In my opinion, this transaction is not a compromise of these rights. In our older legal language the word 'compromise' appears to have been used, in accordance with its etymology, to express the mutual promises of 'persons at controversy' to submit to the arbitrament of a third person the matters in dispute between the two (see 'A compromise defined,' 2 West, Symboleography, 163). In our present language it undoubtedly embraces an agreement between two or more persons for the ascertainment of their rights when there is some question in controversy between them or some difficulty in the enforcement to the uttermost farthing of the rights of the claimant. But, in my opinion, the word is applicable only where there is some such controversy or some such difficulty. Nothing of the sort existed in the present case. In my opinion, the power to compromise does not include the power to give up one chose in action, namely, a secured debenture, in exchange for another chose in action of a totally different kind, namely, a preference share, in the absence of all dispute as to the rights of the creditor, of all difficulty in enforcing those rights, and of any suggestion that the full fruits of these rights could not be obtained. Such a transaction might be described as an exchange, possibly as a barter, or an arrangement; but it is, in my opinion, not a compromise of the rights against the old company." It is to be observed, however, that the Lord Justice was dealing there with the word "arrangement," not as found in this or any section, but was defining the word apart from any context. He did not say that the word "arrangement" in this section had a meaning wide enough to cover such a transaction as he there described irrespective of the circumstances in which the procedure of the section was resorted to.

And there is authority that it does not. In *In re Alabama, New Orleans, Texas, and Pacific Junction Ry. Co.* (2) North J. treats the words "compromise" and "arrangement" in this section as being

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(1) [1893] 1 Ch. 484, n., 491, n.

(2) [1891] 1 Ch. 213, 228.

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synonymous. He says this : “ The section speaks of a ‘ compromise or arrangement.’ What is a compromise ? An arrangement between two parties by which they both make concessions and give up something ” ; and Fry L.J. says (1) : “ But, again, what kind of compromise or arrangement is the most common ? Surely the most common kind of compromise or arrangement is one in which secured creditors diminish or alter the amount of their security.” The point, however, is expressly dealt with by Buckley L.J., as he then was, in *In re General Motor Cab Co.* (2), where he arrives at the same result on a somewhat different ground. Buckley L.J. in that case says : “ That section ”—that is to say, s. 120—“ uses two words—‘ compromise ’ and ‘ arrangement.’ Compromise here there is none. ‘ Arrangement,’ no doubt, is a larger word than ‘ compromise,’ but ‘ arrangement ’ I think in that section must mean something analogous in some sense to ‘ compromise.’ ” In other words, just as an agreement to accept less than 20s. in the pound for a debt may be a compromise where the debtor disputes the debt, or has a difficulty in paying it, that same agreement is no compromise where the debt is undisputed and the debtor can pay. So in the present case an arrangement such as this, where shares are given up and no direct return in respect of them is received, may be an arrangement within the Act where, in Lord Wrenbury’s words, the transaction is analogous in some sense to compromise ; it is not such an arrangement where, as in the present case, there is no trace of anything remotely savouring of compromise in the whole transaction from beginning to end.

It is for this reason that the case of the *Welsh Flannel Manufacturing Co.* (3), so much relied upon by Mr. Clauson, the order in which was made by Swinfen Eady J. on March 30, 1909, is of no assistance to the petitioners. In that case there was insolvency and difficulty in the way of the company and the shareholders, and there was a prospect of no dividends of any kind being receivable for an indefinite time on the ordinary shares if some such arrangement of give and take between the different classes had not been come to. The arrangement, therefore, under which the ordinary shareholders gave up a part of their holding in return for other

(1) [1891] 1 Ch. 246.

(2) [1913] 1 Ch. 377, 384.

(3) Unreported.

benefits was clearly analogous to a compromise. The same will be found to have been the case in all the other reported authorities on the section, where schemes superficially resembling the present in its result were sanctioned. In every one of them there was some difficulty in the situation which was surmounted by the arrangement approved: see *Slater v. Darlaston Steel and Iron Co.* (1); *In re Empire Mining Co.* (2); the *Alabama Case* (3) above cited.

There is, however, as I have said, no such difficulty here. No advantage to the company from adopting this abnormal method of payment, is either alleged or sought to be proved. For this reason, therefore, this scheme is not, I think, an arrangement within the Act at all, and stands on the further side of the shadowy line which separates, on this ground, arrangements which are outside the Act from those that are within it.

It was of course said that the widest construction should be placed on the section, because the shareholder had the fullest protection, not only in the necessity for the support of a substantial majority of the other members of his class, but also in the order of the Court, which will not be obtainable in any except the most proper case. But there are certain rights possessed by a shareholder in relation to a share which the Legislature has not thought fit to place in the arbitrament even of a majority of shareholders and the Court together. With regard to such rights the Legislature has intimated that a shareholder need not attend either a meeting of his fellow-members or appear before the Court to protect them; they will remain to him, so that when he comes back, whether, as it may so often be now, from the war or from a journey, he will find them intact on his return.

The rights proposed to be taken away by this scheme are of those just referred to. There is, I think, serious danger that this otherwise useful section may become liable to grave abuse, especially in cases of so-called arrangements with shareholders when a company is not in liquidation, unless care is taken, and I must in vindication of a principle which I conceive to be very important, especially in these times, dismiss this petition, however much I may regret in this particular case having to do so.

(1) [1877] W. N. 139.

(2) (1890) 44 Ch. D. 402.

(3) [1891] 1 Ch. 213.

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C. A. The company appealed. The appeal was heard on January 19,
1917. 1917.

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On the hearing of the appeal a further affidavit made by Mr. G. W. Reynolds, the general manager of the Guardian Company, was read. In it he stated that in order to maintain the company in its proper position in the insurance world it had become a business necessity that it should extend its operations to marine insurance. This could not practically be done by the Guardian establishing a marine branch of its own. Fusion in some form with an established marine office was the only course available. In negotiating this fusion it was found that it could only be carried out by an exchange of shares, and that it was not feasible to create additional Guardian capital, but that a portion of the existing Guardian shares must be utilized. It followed that the necessary shares must be provided by the existing Guardian shareholders rateably in the same manner as they would receive the benefit of the fusion. This state of affairs created a position of real difficulty to the Guardian which could only be dealt with by some arrangement between itself and its shareholders. To obtain universal individual consent among upwards of 2000 different shareholders was an impossibility as a business proposition. It was to meet this difficulty that the procedure under s. 120 of the Companies (Consolidation) Act, 1908, was resorted to.

Clauson, K.C., Ashworth James, and G. R. Northcote, for the appellants. Younger J. has expressed the opinion that the scheme is satisfactory in every way, but he thought that it was not an arrangement which had in it any element of compromise. He said that if this scheme is an "arrangement" within the section, then any arrangement modifying the rights of the shareholders would equally be within it. The answer is that that was the intention of the Legislature. It is important in the interests of the company that it should be able to carry on marine insurance business, and the scheme affords the most advantageous means of effecting that result. It is undesirable to increase the capital of the company. The company and its members are in a difficulty, and it is commercially advantageous that it should be got over by the

proposed arrangement. It is not necessary that an arrangement, in order to come within the section, should have any element of compromise in it. There is here no dispute, and consequently nothing which can be compromised. It is a settlement of mutual relations. By the arrangement in *In re General Motor Cab Co.* (1) it was proposed to take away the statutory rights of dissentient shareholders. If proper provision is made for dissentient members a reconstruction by winding up and sale of assets for shares in a new company may be effected under s. 120: *In re Sandwell Park Colliery Co.* (2) By a scheme under s. 120 nothing can be done which is ultra vires or contrary to the terms or spirit of the Act. Reduction and rearrangement very commonly go together in a scheme. The sanction of the Court is the safeguard. There is no danger in construing "arrangement" in a wide sense. In one sense, no doubt, there is no compromise here, but the company and its shareholders are in a difficulty which they wish to arrange. There is no surrender of shares to the company here. They are to be transferred, not to the company, but to others.

[WARRINGTON L.J. Why is this not an arrangement in the nature of a compromise?]

If it be necessary to find an analogy to compromise it is here. There is a difficulty arising from the fact that the Reliance Company will not accept any other terms. In the *Welsh Flannel Manufacturing Co.* (3) there was a scheme under which one class of shareholders gave up a portion of their shares to another class, and that was sanctioned by Swinfen Eady J. The object of this scheme is to get over a difficulty and to carry out an arrangement which is necessary in the interests of the company, and it is submitted that the Court ought to sanction it.

[*Mercantile Investment and General Trust Co. v. International Co. of Mexico* (4) was also referred to.]

LORD COZENS-HARDY M.R. In this case I am unable to agree with the view taken by Younger J. The point, which is a narrow one, is really this, whether the scheme, which I will very shortly deal with, is a compromise or arrangement proposed between a

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(1) [1913] 1 Ch. 377.

(2) [1914] 1 Ch. 589.

(3) Unreported.

(4) [1893] 1 Ch. 484, n.

C. A. company and its shareholders within the meaning of s. 120 of the
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Now the scheme, treating it very broadly, is this. The Guardian Company, an exceedingly prosperous long established company, which cannot in any way be said to be lacking in wealth, thinks it desirable, for the purpose of carrying on its business of insurance in various branches, not to start in all parts of the world marine agencies of its own, but to make a fusion with another company, also of high reputation, the Reliance Company, which is a marine insurance company, and, as I understand, solely a marine insurance company; and in order to do that they made a suggestion to the shareholders of the Reliance first of all to this effect: "We will pay you a certain sum for each of your shares." "No," said the Reliance shareholders. "We will not do that; you must give us a certain interest in your own company." The Guardian Company might do that in various ways. One way would be to increase their own capital by the issue of fresh shares to the Reliance shareholders in exchange for the transfer; but for reasons which seem to me to be quite intelligible, it is not a good business proposition for an old company like the Guardian, the whole of the capital of which is not required for all its business purposes, to increase its capital. Then it is suggested that the proposition which the Reliance shareholders said they were willing to accept should be given effect to by an order sanctioning an arrangement between the Guardian Company and its shareholders which would make it obligatory upon a few dissentient shareholders in the Guardian Company, if there be any dissentients, to contribute out of their own shares a certain proportion, and that proportion is made more workable by subdividing the shares of the Guardian into fully-paid preference and ordinary shares not fully paid up. The details seem to me to be worked out with great care and great accuracy in the agreement, but it is not necessary in any way for me to discuss them here. I think what is proposed to be done in perfect good faith, and for very good business reasons, is not a compromise, but is an arrangement proposed between a company and its members, using the words of s. 120, and that there is no necessity to put such a limitation upon those words as Younger J. felt bound to do. With the greatest possible respect to him, having carefully con-

sidered his very able judgment, I am unable to come to the same conclusion as he did.

I think the order ought to be made as asked by the petition.

WARRINGTON L.J. I am of the same opinion. The scheme which we are asked to sanction is no doubt one of a somewhat unusual nature, but for all that it may still be an arrangement within the meaning of the 120th section of the Act.

Now how does the matter arise? Very shortly stated, the position is this. The Guardian Company desires to acquire—and it is common ground that it will be advantageous to the company, and therefore to its shareholders, to acquire—the share capital of the Reliance Company in order that it may obtain the benefit of its marine insurance business. The shareholders of the Reliance, when asked to further the desire of the Guardian by making over their shares, will not sell for cash; they are willing to take a proportion in cash, but they do not want to give up altogether their interest in the marine insurance business, which they would do if they sold the whole of their shares for cash. On the other hand, the Guardian Company consider it inexpedient to create new shares of their own and with them to satisfy the lust of the Reliance for marine shares, and they approach their shareholders to see whether they can obtain from them the use of a proportionate part of their shares in order that with those they may satisfy the Reliance shareholders. Now if it were possible in a large undertaking to obtain the consent of each shareholder to such a proposal there is no doubt that it could be carried out, because there would be nothing to prevent any shareholder, if he pleased, transferring his shares, or a certain number of his shares, to anybody to whom he chooses to transfer them; but of course it is difficult to obtain in a large undertaking like this the actual consent of the individual shareholders. But, assume that such an agreement has been made between all the shareholders and the company, it seems to me to be quite obvious that that would be an arrangement made between the shareholders and the company. I fail to see how it could be otherwise; and that is exactly what is done, because, although the arrangement is not made with the individual shareholders, the arrangement is one which, when sanctioned by the Court under s. 120, will bind all the share-

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C. A. holders concerned. In my view this is an arrangement between
1917 the members of the company and the company, and as such is
capable of being sanctioned under the 120th section.

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Warrington L.J.

I may add that in my opinion the case of *In re General Motor Cab Co.* (1) does not touch the present case. In that case there was an attempt by means of what was called an arrangement between the company and its shareholders to do that which the Act only permitted to be done in another way.

A. T. LAWRENCE J. I am of the same opinion. I do not think there is any sufficient ground for limiting the meaning of the word "arrangement" in this section. To my mind, any risk is sufficiently guarded against by the fact that the sanction of the Court must be obtained. The section is not meant to be limited merely to a compromise, it is to apply also to something that is an arrangement. This proposal seems fairly to come within the word "arrangement," and I do not see any object in limiting its meaning so as to exclude a scheme which is admittedly beneficial to all parties concerned.

Solicitors: *Trower, Still, Parkin & Keeling.*

(1) [1913] 1 Ch. 377.

G. A. S.

In re ARAMAYO FRANCKE MINES, LIMITED.

[1916 A. 1017.]

Trading with the Enemy—Company—Registered Office in England—Company's Mines in Bolivia—Produce supplied to Government for Munitions of War—Proposed Transfer of Business to Swiss Company to avoid Payment of Income Tax—Board of Trade—Appointment by Court of Controller—"Expedient in the public interest"—Form of Order—Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 3—Trading with the Enemy Amendment Act, 1914 (5 & 6 Geo. 5, c. 12), s. 11, sub-s. 1.

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Sect. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, which amends s. 3 of the Trading with the Enemy Act, 1914, empowers the Board of Trade to apply to the Court to appoint a controller under s. 3 "in any case in which the Board think it is expedient in the public interest that a controller should be appointed owing to circumstances or considerations arising out of the present war."

A company was incorporated in England to acquire and take over a business of mine owners and smelters carried on in Bolivia. At the commencement of the war the greater number of the shares in the company were held by Bolivians. The directors of the company had spared no efforts to utilize for the benefit of the Allied Powers the mineral products of the company's mines and works. In order to escape the increasing burden of the British income tax the foreign shareholders resident abroad had become desirous that the business of the company should be transferred to some other country. The directors accordingly issued a circular to the shareholders stating that they proposed to recommend to them that the place of business of the company should in future be in Switzerland, and that for that purpose the undertaking should be vested in a company incorporated in that country. At a meeting of shareholders this proposal was sanctioned, and a provisional agreement for giving effect to it had been executed by the directors. In order to prevent the completion of the agreement and the transfer of the business under it the Board of Trade applied to the Court under s. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, for the appointment of a controller:—

Held by Younger J., that an order appointing a controller ought to be made, but that his powers would be limited to preventing the agreement for the transfer of the business from being carried into effect.

Held by the Court of Appeal, affirming the decision of Younger J., that there was ample jurisdiction under s. 11, sub-s. 1, of the Act

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in the public interest to make the order and to prevent the English company becoming a Swiss company whose shareholders would presumably be able to transfer their shares to alien enemies.

ORIGINATING MOTION.

This was an application by the Board of Trade that William Cash might be appointed until further order to be the controller of the company, Aramayo Francke Mines, Limited, and as such to take possession of and receive the assets and to manage the business of the said company with the powers of a receiver and manager appointed by the Court, subject nevertheless to and with such modifications and restrictions or extensions as the judge in chambers might from time to time direct, and that such further or other directions might be given in the premises as to the Court might seem meet.

The following statement of facts is taken from the written judgment of Younger J. (1):—The company, which was registered in 1906, was incorporated to acquire and take over as a going concern a business of mine owners and smelters carried on at Tupiza in Bolivia under the style or firm of Aramayo Francke & Co. The business was initiated in 1867 and gradually developed year by year until it had become a flourishing enterprise. In 1901 all the members of the original partnership had become resident in Europe, and in the same year Mr. F. A. Aramayo, who is still the chairman and managing director of the respondent company and has for many years apparently been the controlling spirit of the concern, established himself in London, where he founded the firm which still exists and is now known as Avelino Aramayo & Co. That firm has ever since its foundation been the financial agent in Europe through whom the output of the Bolivian mines and works has been marketed. In 1906 the partners in the mines and smelting works considered it expedient that they should become incorporated; they deliberated where their place of incorporation should be; and as it was anticipated that further capital might be required and that that could best be raised in London, it was decided that the proposed company should be registered in this country. Accordingly in 1906 a private company with a capital of

(1) This judgment was delivered *in camera*, but is reported by permission of the learned judge.

500,000*l.* was incorporated in England, and to that company all the partnership assets were transferred. In 1909 the company became a public company with a capital of 600,000*l.* divided into 600,000 shares of 1*l.* each. Large sums by way of further capital have been put into the enterprise, but, contrary to the original expectation, these moneys have not in fact been found to any extent by the British public. Of the 600,000 shares of the company no less than 508,476 were at the commencement of the present war held as to 408,856 by the former Bolivian partners, their connections or successors, while 99,620 of these shares now vested in the custodian were standing in the names of two enemy subjects, one of which, a charitable institution at Cassel, held 78,880. Although there are 300 shareholders in the company, only 91,524 shares are even now in the hands of outsiders. As I have said, Mr. Aramayo, the managing director, chairman and principal shareholder of the company, is a Bolivian citizen. From 1897 to 1903 he represented that Republic as Minister Plenipotentiary at the Court of St. James, and the great bulk of the company's shares are held by him and other Bolivians resident in France. Mr. Aramayo, it is common ground, has always been closely attached to the United Kingdom, and he and the entire board of directors of the company have since the commencement of the war spared no effort to utilize for the benefit of the Allied Powers the mineral products of the company's Bolivian mines and works. One of the principal metal products of these mines urgently required by the Allies is bismuth. This metal was, previous to the war, refined in Germany only, but since the war Messrs. Avelino Aramayo & Co. have established a factory in London for the purpose of refining it, with the result that refined bismuth can now be obtained from London. The next most important product of the company as applied to war purposes is wolfram. All the wolfram produced and shipped at Antofogasta up to August 31, 1916, has been delivered under contract with the Ministry of Munitions, and tin, silver, copper, and antimony produced by the company's mines are also being shipped to England. Indeed, it was conceded by Mr. Austen-Cartmell, on behalf of the Board of Trade, in the fullest terms, that throughout the war the conduct of the company's business has, from the point of view of the Allies, been everything that could be desired, and in fact the

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Allied interests have been safeguarded by the company even to the point, in certain instances, of involving it in substantial pecuniary loss. Moreover, I am quite satisfied upon the evidence before me that that attitude on the part of those controlling this company was not due in any way to the fact that the company was registered here. I am satisfied that the action of Mr. Aramayo and his co-directors, and the Bolivian shareholders in the company who supported them, would, provided only they were left free agents in the matter, have been the same whatever had been the actual situation of the company's registered office, and wherever had been the seat of its administration. Indeed, whatever happens to this company, the real seat of its operations is and must always be Bolivia. The whole business of production is carried on there, while the sale of the company's products is exclusively in the hands of the London firm of Avelino Aramayo & Co.—in other words, of Mr. Aramayo himself as the governing partner of that firm.

Now, in the course of time the burden of the British income tax upon the foreign shareholders of the company resident abroad grew to be exceedingly grievous, and they very naturally, as I think, became anxious, if they could, to be relieved of it. They felt, as has been explained by Mr. Aramayo, that their undertaking had grown on its own merits; that it had never obtained any support from English capitalists; that it was from Bolivian firms and their friends that financial aid, when it was needed, was forthcoming; and that the actual registration of the company here had been little more than an accident. "Having these circumstances in view," said Mr. Aramayo at a meeting of the company's shareholders, a report of which has been put in evidence by the Board of Trade, "the principal shareholders of the company, who reside abroad, where they are also liable to the payment of taxes, have perceived with anxiety and alarm the constant increase of taxation upon profits imposed by the Government of this country, which in this particular case has become unbearable, as will be more clearly stated hereafter. The profits of the company are derived from properties in Bolivia obtained by the employment of Bolivian capital, and if they are liable to taxation it is only by reason of the registered office of the company being in London. This liability might be justified in the case of shareholders resident in Great Britain, but cannot be

justified in the case of shareholders in other countries, who, not enjoying the benefits of the law of Great Britain, can scarcely be called upon to share its burdens. The incidence of taxation is particularly heavy in our case, for two reasons—firstly, on account of the nature of our business, because, mines being a wasting asset, the income derived from them should be considered more like a source of formation of capital while profits last than as a revenue; and, secondly, because a high percentage of the profits is not available for distribution seeing that it has to be set aside for service of debentures and new improvements and developments, to say nothing of reserve funds. If you examine our balance-sheets you will find that during our existence as a public company—that is to say from the 1st June, 1909, to the 31st May, 1915—the net profits, subject to income tax, have amounted to 605,280*l.*, while the total sum paid in dividends to shareholders has only been 365,929*l.*; and this means that the shareholders have had to pay 60 per cent. more than the amount of income tax corresponding to the profits actually received by them, which would be equivalent to 8*s.* 4*d.* in the pound under present conditions.”

To redress this grievance the directors set themselves to consider the possibility of transferring the incorporated company to some other country. They proceeded to consider the conditions of various cities. San Sebastian and Buenos Ayres were successively passed in review. Ultimately the conditions of Switzerland were examined and it was found that the existing laws of the canton of Geneva were exceedingly liberal, offering all the advantages that were requisite. Accordingly, on August 17 last a circular was issued by the directors to the shareholders in the following terms: “Your directors, having been approached by certain shareholders resident abroad holding a large majority of shares in this company, have for some time past had under consideration the advisability of changing the place of business of the company. Accordingly, the directors propose to recommend to the shareholders that the place of business of the company should in future be in Geneva, Switzerland, and that for this purpose the undertaking of the company be vested in a company incorporated in that country upon the basis of an exchange of shares of equal value and the assumption by the Swiss company of the liabilities and engagements of this company. In case you

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may not be able to attend the meeting convened by the accompanying notice, I enclose a form of proxy which please sign and return to me," and so on. The meeting was duly held, I think, on August 29, and at that meeting the following resolution was passed : " That this meeting hereby approves of the change of the place of business of the company from London to Geneva in Switzerland, and hereby confirms any steps which the directors may have already taken with a view to accomplishing such purpose."

Now a Swiss company has been or is in course of being formed. A provisional agreement dated August 4, 1916, for giving effect to the proposal so sanctioned by the company had before the meeting been executed, and it is in order to stop the completion of that agreement and the transfer of the business under it being carried out that the appointment of a controller is desired.

To complete the statement of the facts, I need only further read the following additional extract from Mr. Aramayo's speech at the meeting of shareholders referred to. " It is naturally objected," he says, " that English shareholders dislike the notion of owning shares in a company whose proceedings are not controlled by the law of Great Britain. This we cannot help, but all measures have been taken to keep matters as nearly as possible as they are now. The staff in Bolivia will continue to be the same, the management in Europe will continue under my personal supervision and control as hitherto, the sale of all our products and the provision of materials to the mines will be made through London by Messrs. Avelino Aramayo & Co., who will continue to be the financial agents of the company. The auditors appointed by the new company will be Messrs. Tribe, Clark, Painter & Co., who are well acquainted with our business, and will watch the interests of the shareholders. If no English residents have been invited to take a seat on the board it is because we do not wish to give occasion to the surmise that the business is being managed in England, and, therefore, liable to English taxation." Then there are two passages in the affidavit which has been filed by Mr. Aramayo on this motion to which I ought to refer. In paragraph 3 Mr. Aramayo says this : " The sole object and purpose of the change of the place of business of the said company from London to Geneva referred to in the said report is to save the said company from having to make returns of and being

assessed to income tax on the whole of its profits, which it is obliged to do so long as the place where the management is carried on is in the United Kingdom. There is no intention whatever on the part of myself or of any of the existing board of directors or of the proposed new board of directors to make use of the said change for the purpose of altering or affecting in any way the sales of the produce of the company's mines or of avoiding any control which the Courts of the United Kingdom or the naval and military forces of the British Empire have over such sales or the destination of such produce. The staff of the said company in Bolivia is English and the general manager is an Englishman, and the financial agents of the company who have the control of the metals shipped are and will remain in England." Then in paragraph 5: "All the above-named"—that is, the directors of the company—"are intensely loyal to the cause of the Allies in the present war, and none of the board of directors would consent to any change which they could anticipate would assist the enemies of the British Empire, nor would any of the above-named directors of the new company consent to any transaction which would be likely to result in any of the produce of the said mines being sold or delivered to any enemy of the United Kingdom during the war." Then paragraph 6: "I am willing to give my personal undertaking to this honourable Court that the change of the place of business shall not involve any transaction such as that referred to being entered into. The efficient carrying on of the management of the said company's business and mines depends largely on the intimate knowledge I have acquired by personally visiting the mines and acting as manager prior to the formation of the company and as managing director since its formation, and requires that I should continue periodically to visit the mines, and any control exercised over the business of the company will make it more difficult for me to carry on the management with efficiency and will thus result in a diminution of the products of metals for the benefit of the Allies."

Further, after the Board of Trade had intimated that they objected strongly to the transfer of the business a letter was written by the solicitors for the company, Messrs. Dale & Co., on September 29, 1916, in which they say this: "We understand from what Mr. Thomas said at the meeting of shareholders"—Mr. Thomas was the representative of the custodian—"that it is the

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proposal to change the company owning the mines to a company not resident within the jurisdiction which caused the Board of Trade to think it expedient that a controller should be appointed, and that the Board would not have thought it expedient to apply for such appointment if the company had been able, without altering the ownership of the mines, to carry out its object of avoiding the payment of income tax on profits earned by the company abroad which are not remitted to this country. It has been suggested to us that the company might probably attain the desired result without changing the ownership of the mines by following the steps taken by the Egyptian Hotels, Limited, as set out in the report of *Mitchell v. Egyptian Hotels, Limited*, L. R. 1915, Appeal Cases, 1022. We are instructed to say that if your view of the matter agrees with what is stated above we should be prepared to advise our clients to refrain from proceeding further on the resolution passed at the meeting of August 29, 1916, until we have taken the necessary steps to put the company in a position so far as income tax is concerned similar to that occupied by the Egyptian Hotels, Limited, and have ascertained whether the Commissioners of Inland Revenue recognise that the decision applies, in which case we should be willing to continue the undertaking so long as the object with which the contract with the Swiss company was entered into continued to be successfully attained."

Now the Board of Trade is not satisfied with the proposal contained in that letter, nor with the undertakings offered, nor with the arrangements made for the continuance of the business as before, and it pressed, and it still presses, for an order appointing a controller, limited, however, so far as his powers are concerned to those necessary to attain the object which it alone has in view.

The motion was heard before Younger J. in camera on November 8 and 9, 1916.

The question raised turned on the construction of s. 3 of the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), as amended by s. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914 (5 & 6 Geo. 5, c. 12). (1)

(1) Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 3: "Where it appears to the

Board of Trade in reference to any firm or company—

"(a) that an offence under this

Austen-Cartmell, for the motion.

Edwardes Jones, for the respondent company.

Cur. adv. vult.

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1916. Nov. 14. YOUNGER J. This is a motion by the Board of Trade made in pursuance of s. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, asking for the appointment of a controller of the respondent company, Aramayo Francke Mines, Limited, on the ground, in the terms of the sub-section, that the Board think it expedient in the public interest that such appointment should be made owing to circumstances or considerations arising out of the present war.

Act has been or is likely to be committed in connexion with the trade or business thereof; or

“(b) that the control or management thereof has been or is likely to be so affected by the state of war as to prejudice the effective continuance of its trade or business and that it is in the public interest that the trade or business should continue to be carried on;

the Board of Trade may apply to the High Court for the appointment of a controller of the firm or company, and the High Court shall have power to appoint such a controller, for such time and subject to such conditions and with such powers as the Court thinks fit, and the powers so conferred shall be either those of a receiver and manager or those powers subject to such modifications, restrictions or extensions as the Court thinks fit. . . .”

Trading with the Enemy Amendment Act, 1914 (5 & 6 Geo. 5, c. 12), preamble: “Whereas

it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as ‘enemies’), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; and to make other provisions for preventing trading with the enemy:”

Sect. 11: “(1.) In addition to the grounds on which an application can be made to the Court by the Board of Trade to appoint a controller under section three of the principal Act, such an application may be made in any case in which the Board think it is expedient in the public interest that a controller should be appointed owing to circumstances or considerations arising out of the present war, and that section shall be construed accordingly.”

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The motion differs from all others that have hitherto been made for such an appointment in that it is strenuously opposed by the company, and it raises for consideration points of principle which are of very great importance.

The facts are not in dispute. [His Lordship stated the facts as above set out and continued :]

Now in that state of things it is desirable first of all to see what this application is not. This is not an application to restrain the commission by the company either of an ultra vires act or of an illegal act. For the purposes of this motion there is no suggestion on the part of the Board of Trade that the proposed action on the part of the company is ultra vires either on the principle of *Bisgood v. Henderson's Transvaal Estates, Ltd.* (1), or on any other principle. If it were, the transaction could be challenged by the custodian as the registered holder of a large block of shares in the company, or, I suppose, by information at the instance of the Attorney-General. Nor, again, is it suggested that the transaction is forbidden by any of the Defence of the Realm Regulations, or that it is in any way unlawful. In other words, it is only under s. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, if at all, that the transaction can be indirectly stopped.

But, before considering the grounds which in the opinion of the Board make that sub-section applicable, it will be convenient to ascertain precisely the scope of the relevant sections of the Acts relating to the subject. These are s. 3 of the principal Act and s. 11, sub-s. 1, of the Amendment Act. Further, it will be desirable to define what is the function of the Court in dealing with applications under these sections.

Now, as to the first point, it is true that the words in s. 11, sub-s. 1, "expedient in the public interest that a controller should be appointed owing to circumstances or considerations arising out of the present war," are almost as wide as words can be, and I am not prepared to adopt with regard to them the ejusdem generis construction with the words of s. 3 of the principal Act for which Mr. Edwardes Jones contended. But there is, nevertheless, I think, one distinct limitation to be placed on these words, wide as they are, and that is that both of the sections—s. 3 of the principal Act and

s. 11 of the Amendment Act—contemplate and seek to provide for the continuance of the business to be controlled. Neither section is concerned with the closing of businesses. Sect. 3, sub-s. 1, shows that the appointment of the controller is to secure that the business shall be conducted free from offence under the Act; sub-s. 2 intends by the appointment of a controller to secure that a business, which ought in the public interest to be continued, shall be effectively continued; and I cannot doubt that the object of an appointment authorized by sub-s. 1 of s. 11 is the same as one authorized by sub-s. 2 of s. 3, namely, to secure the effective continuance of a trade or business which ought in the public interest to be continued effectively. It would therefore, in my opinion, not be expedient in the public interest, within the meaning of that sub-section, that a controller should be appointed, if it were apparent or were shown that such an appointment, so far from securing the continuance of the business, would, or might, have the effect of curtailing if not of destroying it altogether. In other words, although these sections are in no way confined, or even, except possibly those included in s. 3, sub-s. 2, of the principal Act, primarily applicable, to enemy businesses, they embody the principles enunciated by Lord Parker in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)* (1) in the following passage: "It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the

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King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

The opposite principle, if principle it is, will be found embodied in s. 1 of the Trading with the Enemy Amendment Act, 1916, but that principle has no place in this earlier Act, a very material consideration in a case like the present where there can, without the loyal participation of the company's staff, be no effective official control of smelting works in Bolivia, and where the success of the company's operations there and its activities elsewhere are mainly dependent upon the co-operation of Mr. Aramayo, who, Mr. Edwardes Jones very plainly hinted, might, if it indicated distrust of himself, be so hurt by the appointment of a controller that he would refuse to co-operate with him at all.

But, further, it is necessary to consider the function of the Court on such applications. Mr. Austen-Cartmell put forward the contention that where in terms of the section the Board of Trade committed itself to the opinion that the appointment of a controller was expedient in the public interest the appointment ought to be made, if not as a matter of course, at least unless strong cause were shown to the contrary. I cannot quite take that view. It is, of course, obvious on the section that the responsible opinion of the Board of Trade must have, as it ought to have, the greatest possible weight with the Court, but the Court has at the same time a duty to discharge towards the company, firm, or person concerned, and that duty it is not at liberty to surrender to anyone, whether a Government department or another. That the intervention of the Court is not a mere matter of form will be seen, if proof be needed,

by a comparison of s. 2 with s. 3 of the principal Act. The opinion of the Board of Trade and the grounds on which it is based may, I think, clearly be traversed, and the appointment of a controller is at the lowest a joint responsibility shared between the Board of Trade and the Court. I recognise that to refuse such an appointment when pressed for, as this is, is a serious responsibility, but where the appointment is opposed, as in this case it is, that responsibility must, if necessary, be assumed.

And now, bearing in mind the danger which in the present case is attendant on any appointment not accepted by the company, I proceed to consider the grounds on which Mr. Austen-Cartmell on behalf of the Board of Trade supported the opinion of the Board, that it is expedient in the public interest that a controller of this company should be appointed owing to circumstances or considerations arising out of the present war. They were in substance these : (1.) That it was not expedient in the public interest that a company which had the benefit of British protection should be allowed to take steps to get rid of a war tax ; (2.) that there was an appreciable risk that if the control and management of the company were removed to Switzerland the company's operations might be conducted, if not by the present board, at least by their successors, in such a way as to prejudice the vital necessities of the Allies in the supply of materials required for the manufacture of munitions of war ; (3.) that the removal of the company's centre of administration to Switzerland would deprive the British authorities of the protection of the censorship exercisable over correspondence received in and despatched from this country ; and (4.) that the public interest would be further safeguarded by the fact that the appointment would not necessarily be determined with the conclusion of peace.

Now, feeling as I do the responsibility of criticizing judicially an opinion of the Board of Trade which may ultimately, in part at least, be based on executive or national considerations which cannot be, or at all events have not in this case been, communicated to the Court, I must nevertheless express the opinion that in my judgment these grounds are not by themselves in the present case a sufficient justification for the order which is asked. In my view the extent to which the appointment of a controller would prevent

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this company from lawfully escaping, if it can, from the burden of the present war-inflated income tax, so far from being an argument in its favour is a cogent argument against the appointment. Notwithstanding the war, it is still, in my judgment, true that if the subject is not brought within the letter of a taxing Act he is free of the statute, however much within the spirit of the law his case might otherwise appear to be. "The benefit of the doubt is the right of the subject." Further, I am not unmindful of the fact that this company is in fact a collection of Bolivian citizens carrying on a Bolivian business, and I may apply to it, properly as I think, the theory of the *Daimler Case* (1) so as to concede to its shareholders the principle that a taxing Act, so far as it is consistent with the ordinary canons of construction, should be interpreted so as not to operate unreasonably in the case of a foreigner sojourning in this country. Putting it in another way, while the war has laid on all British subjects the patriotic duty of supporting their country to the last in its struggle for existence, we cannot complain if neutrals object to pay, nor is it becoming on our part to deny them the privilege of escaping lawfully if they can from the obligation of paying for our own war expenditure. It is said, I know, that the transfer of the company's business to the Swiss company would not achieve the result of escaping from British income tax to the extent expected. That may or may not be so. It is not a question into which I need go on the present occasion. The extent, be it great or small, to which the controller's appointment would interfere with the company's otherwise lawful procedure in this direction is, as I have said, in my view an argument against his appointment and not one in its favour.

Nor am I prepared to treat as sufficient the other reasons put forward by the Board of Trade, whether taken together or separately. In a case like the present, where the record of this company is so fine, where its services to the country have been so notable and its proposed course of action so reasonable from a neutral shareholder's point of view, I think the company is entitled to ask that Mr. Aramayo's undertaking as to the future should be accepted, and that the transfer of its administration to Switzerland should not be stopped on grounds which are only of weight if it is to be supposed

(1) [1916] 2 A. C. 307.

that the whole case is a false one. And there is another consideration to which I have already alluded and which leads to the same conclusion. In my opinion there is grave reason to fear that if a controller were to be appointed for any such reasons as have been put forward by the Board of Trade the company and its officials would feel themselves injured ; they might even become antagonized to the extent of withdrawing their co-operation from the controller, with the result that a controlled British company would be materially less valuable to this country and its Allies than would a free Swiss company.

But, having said so much, I have still arrived at the conclusion for other reasons that a controller should in this case be appointed. I accept unreservedly the statement of Mr. Aramayo that the course of business, if the Swiss company be formed, will remain unchanged. I am quite satisfied that if matters rested with him or the proposed directors, or even with any successors whom the shareholders of this company would appoint, the position of this country in relation to the company's products would remain altogether unaffected by the formal change in its administrative office. But I am not satisfied that in Switzerland these gentlemen will throughout the whole course of the war be left by Swiss law free to dispose of their products, adapted for munitions of war as they are, in any way they may desire to dispose of them. There is a large frontier in Switzerland open towards the territories of both of the Central Powers, and in this war of material it is to my mind very possible—the advantage to the enemy being so obvious—that such pressure will or may be put upon Switzerland by these Powers that the supply of munitions of war by a Swiss citizen to any belligerent may have to be declared to be unlawful and may be prohibited.

It appears to me that this consideration is one that is sufficient in the public interest to justify the opinion of the Board of Trade and to justify steps being taken by it to prevent the transfer of this business to a company liable to be controlled by the law of a country so exposed to enemy pressure, and I cannot but think and believe that Mr. Aramayo himself would not resent an appointment which was made only for that reason—an appointment which involved no sort of reflection upon himself or the directors of the company, and which was designed to leave him free under all

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But it is a logical conclusion from the principles upon which this judgment is based that the appointment is not to empower the controller, except after a special application to the Court for that purpose, to interfere with the company's passing any resolutions it may be advised in order to obtain if it lawfully can with regard to income tax the benefit of the decision in *Mitchell v. Egyptian Hotels, Ltd.* (1), or any other exemptions. And, while I disclaim any intention to fetter my discretion if and when any such application is made, I desire very clearly to intimate that if the evidence in the case remains as it is, and if the objection of the controller to the course which the company may then propose to take is of a kind similar to that just alluded to as sufficient, his application will at my hands be much more readily entertained if it be accompanied by an offer from the Commissioners of Inland Revenue to levy upon the company for the further duration of the war no greater assessment in respect of income tax than would have been exigible if the proposals objected to had in fact been carried out.

In these circumstances I think that the order for the appointment of a controller ought to go. His powers will be limited to preventing this particular transaction of sale being completed, and there will be an express reservation in the order of liberty to the company to deal with the matter of income tax in the manner I have indicated. If the company are willing to give the undertakings which have been previously given while this matter has been pending, and which I understood from Mr. Austen-Cartmell he on behalf of the Board of Trade would be quite willing to accept, then in place of the actual appointment of a controller these undertakings will be substituted.

In my opinion the case is one in which there ought to be no order as to costs.

On the application of counsel for the company his Lordship granted leave to appeal.

The order as finally settled (so far as material) was as follows :—

" This Court did order that this motion should stand for judgment

and this motion standing in the paper for judgment this day accordingly.

“ And the Board of Trade by their counsel not alleging that there has in reference to the said company been any offence under the Trading with the Enemy Act, 1914, in connection with the trade or business of the company and disclaiming any imputation upon the company or its directors or officers, but asking for the appointment of a controller of the company solely on the ground that the case is one in which the Board of Trade think it is expedient in the public interest that a controller should be appointed owing to circumstances or considerations arising out of the present war,

“ This Court doth hereby appoint William Cash . . . to be until further order controller of the above named company, Aramayo Francke Mines, Limited.

“ And it is ordered that the powers of the said William Cash as such controller are to be those of a receiver and manager appointed by the Court subject nevertheless to and with such modifications and restrictions or extensions as the Court or the judge in chambers may from time to time direct.

“ And it is ordered (by way of modification or restriction of the powers hereinbefore conferred on the said William Cash as such controller) that the said controller is until further order to leave the ordinary conduct of the business of the company in the hands of the directors of the company and that the powers so conferred on the said controller as aforesaid are not until further order to be exercised excepting so far as may be necessary to enable the said controller to obtain such information as he may require as to the operations or proposed operations of the company or the conduct or management or proposed conduct or management of its business and to prevent the transfer to a new company of the respondent company's business and undertaking which has been proposed by or on behalf of the company as appearing in the evidence herein.

“ And it is ordered that if any resolution is passed or submitted to the company in general meeting with a view to the company obtaining (if it legally can) exemption from income tax the said controller is to apply to this Court for directions, but except in so far as may be otherwise directed by an order to be made upon

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The company appealed. The appeal was heard on January 22 and 23, 1917.

Edwardes Jones, for the appellants. The decision of Younger J. was wrong. The title in both the Acts indicates that the object is to prevent contravention of the laws relating to trading with the enemy, and any suggestion of such contravention is disclaimed in this case.

In clauses (a) and (b) of s. 3 of the original Act, which state the grounds on which the Board of Trade may apply to the Court for the appointment of a controller, the word used is “likely,” and the grounds of jurisdiction are defined. In s. 11, sub-s. 1, of the amending Act the word used is “expedient.” No definite grounds are stated, but the doctrine of *eiusdem generis* applies, and, even if it does not, the two sections must be construed together, and a mere possibility of circumstances arising out of the war which make the control expedient does not justify action either by the Board of Trade or by the Court.

Although there is no preamble in the original Act, there is a preamble to the amending Act. That preamble was, it is submitted, inserted in order to act as a guide to the Court in the exercise of its judicial discretion. “The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention”: Maxwell on the Interpretation of the Statutes, 4th ed. p. 75. The word “expedient” is an ambiguous word until the point of view is defined, and there is not here any suggestion of a ground on which the order could be considered “expedient” within the meaning of that word in the preamble.

[*Austen-Cartmell* referred to s. 14 of the amending Act.]

This is not a case to which either s. 3 of the original Act or s. 11 of the amending Act applies, because the powers to be conferred are those of a receiver and manager and it is no part of the functions of a receiver or manager to exercise the control given by this order.

The Board of Trade relied on cases already decided, but those cases were unopposed, and there is a grave danger in following

a series of cases which have been decided in the absence of opposition. In the only reported case which bears directly on this case, namely, the case of *In re Meister Lucius & Bruning, Ltd.* (1), the statement in the head-note to the report in *The Times* Law Reports that "On such an application (i.e. to appoint a controller) all the evidence that the Court ought to require is some evidence that the information of the Board of Trade in reference to the state of things laid down by the section as a condition precedent to the application has some reasonable foundation" is not justified by the case as reported, and is not correct. The learned judge was right in holding that it is for him to determine after giving full weight to the opinion of the Board of Trade whether the state of things laid down as a condition precedent exists, and if he decides that there was no reasonable foundation for the opinion of the Board of Trade there is no jurisdiction. If he finds that there was some reasonable foundation for that opinion, then, the jurisdiction having been founded, the first part of s. 11 of the amending Act is spent and the judge is bound to administer justice between the parties. In so doing he must be guided, not by what the Board of Trade think expedient, but by the Acts giving the jurisdiction, and it then appears that there are four considerations to be taken into account by the Court which are totally different from what the Board of Trade have to consider :

1. The Board of Trade represent a totally different aspect of the public interest from that which is represented by the Court. The Board of Trade consider the public interest from the departmental point of view, which is concerned with the supply of munitions, without hearing parties or evidence. The Court considers what is right after hearing the parties and evidence. "Expedient in the public interest" is an ambiguous phrase until it is ascertained what the public interest is. Here Younger J. rightly formed the opinion that it was wrong in the public interest to appoint a controller. The only assets of this company which are of any use are its mines in Bolivia, and the only effective control of the products is the British Fleet, and the evidence showed that even in the interests of enhancing the supply of munitions it is not expedient that the order should stand.

(1) (1914) 31 Times L. R. 28 ; [1914] W. N. 390.

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The effectiveness of an order appointing a controller will depend entirely on the loyalty of Mr. Aramayo. I rely on the fact that Mr. Aramayo is doing his best for the Allied cause and that the evidence is that a control order will hamper him in continuing to do so.

The order asked for is not one which judicially ought to be made, both on the ground that it is an order which in substance and effect relates to foreign land and which the Court has no power to enforce : Dicey on the Conflict of Laws, 2nd ed. p. 201, r. 39 ; and also because in order to be effective it must be in the nature of an order for specific performance of personal service by Mr. Aramayo.

2. The Court is bound to hear evidence, if offered, while the Board of Trade form their opinion without hearing evidence. Here the evidence shows that Mr. Aramayo does not intend to alter the course of the business of the company. Younger J. was right in holding that this is in substance a neutral company, and where you have a neutral who is *prima facie* doing his best in the interests of this country it is not expedient to make an order against him.

3. The Court is bound to administer equal justice to all. It ought not, therefore, to make an order against a person which may be harmless owing to that person's loyalty unless it could safely make the same order against a disloyal person, and it would be obviously inexpedient in the circumstances here proved to make an order against a disloyal person.

4. The Court is entitled to take into consideration the general interests of the nation, and if it can take judicial notice of the ground on which Younger J. acted, it can also take judicial notice of the probability that the making of such an order which in effect restrains a friendly neutral from removing his business from subjection to British income tax will have the effect of causing other neutrals to withdraw their businesses for fear of similar orders.

I rely upon the extremely favourable character of Younger J.'s judgment as a reason why this company should be allowed to continue its work for the Allied cause unfettered.

Austen-Cartmell, for the Board of Trade, was not called upon.

LORD COZENS-HARDY M.R. This is an appeal of some importance from an order made by Younger J. which was said by counsel for the appellants to be one in excess of jurisdiction on the part of the learned judge, or rather one which, though in a sense it may have been within his jurisdiction, was not within his judicial discretion as properly understood. There are two sections, and two sections only, with which we have to deal. The first is s. 3 of the Trading with the Enemy Act, 1914, which is as follows: "Where it appears to the Board of Trade in reference to any firm or company—(a) that an offence under this Act has been or is likely to be committed in connexion with the trade or business thereof; or (b) that the control or management thereof has been or is likely to be so affected by the state of war as to prejudice the effective continuance of its trade or business and that it is in the public interest that the trade or business should continue to be carried on;"—neither of those events is said to have happened—"the Board of Trade may apply to the High Court for the appointment of a controller of the firm or company, and the High Court shall have power to appoint such a controller, for such time and subject to such conditions and with such powers as the Court thinks fit, and the powers so conferred shall be either those of a receiver and manager or those powers subject to such modifications, restrictions or extensions as the Court thinks fit." Though those are very wide powers, yet they were not considered by Parliament to be sufficient, and accordingly by s. 11, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, it was provided that "In addition to the grounds on which an application can be made to the Court by the Board of Trade to appoint a controller under section three of the principal Act,"—that is, the section I have just read—"such an application may be made in any case in which the Board think it is expedient in the public interest that a controller should be appointed owing to circumstances or considerations arising out of the present war, and that section shall be construed accordingly."

I will just mention, to pass it by, because it really does not seem to assist us at all, that there is a preamble to this Act, and it has been contended that that alters and limits the language of the section. The preamble is in these terms: "Whereas it is expedient to make further provision for preventing the payment

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of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war (which persons and bodies of persons are hereinafter referred to as 'enemies'), in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; and to make other provisions for preventing trading with the enemy." I fail to appreciate the argument that there is anything in that preamble which cuts down the generality of the language of s. 11, or which justifies us in construing s. 11 otherwise than in accordance with the plain meaning of its language. To say that we are to construe s. 11 as limited in meaning by reason of the preamble substantially to what is found in s. 3 would be a disregard of the language of the preamble itself, which refers to making "other provisions for preventing trading with the enemy." I pass that by without saying any more because it seems to me that there is no force whatever in that argument.

We must remember that this is a very peculiar jurisdiction, and the circumstances under which it arises here are also peculiar. The company in question, the Aramayo Francke Mines, Limited, is undoubtedly an English company. It is a company owning mines in Bolivia, but it is an English company, and it has undoubtedly given very valuable aid to the Government of this country, for practically all the produce of the mines has been sent over to this country during the war; and His Majesty's Government recognize fully the loyalty of the directors and their admirable conduct in the management of the company. Mr. Edwardes Jones seems to think that the present proceedings were an attack upon the managing director, Mr. Aramayo. Any such attack is disclaimed by the Crown through Mr. Austen-Cartmell, representing the Board of Trade. The order obtained is not made against him at all, but it is an order appointing a controller of the company; and I think that it is altogether irrelevant to say that this order ought not to have been made because the managing director happens to be behaving extremely well towards this country.

Now what are the facts? This English company was charged with income tax, to which they rather objected. The directors thought of various schemes for getting over that difficulty, and the

one they ultimately proposed to give effect to was, as stated by them in their circular issued to the shareholders, that the undertaking of the English company should "be vested in a company incorporated in that country"—that is Switzerland—"upon the basis of an exchange of shares of equal values and the assumption by the Swiss company of the liabilities and engagements of this company."

What would the effect of that be? The company would cease to be an English company and it would become a Swiss company, which would not be amenable to English laws. The English Courts would have no such control over this important company as they now possess, and would have no jurisdiction to restrain dealings with or transfer of shares in that company to alien enemies, and no power to prevent dividends being paid to alien enemy shareholders.

It seems to me this is plainly a case in which the Board of Trade were justified in applying in the public interest to the Court to appoint a controller, and that is the first step. Then was Younger J. justified in appointing the controller as asked? It seems to me that he was. I base my decision partly upon the second ground advanced by the Board of Trade, but also upon the final point raised by Younger J. in his judgment, which is another view of the admitted facts. It is said that the Court ought not to interfere with a company which has behaved so well; but the order made by the learned judge is so guarded and protected that I cannot conceive that there will be any difficulty in Mr. Aramayo doing what he has done hitherto as general manager with regard to managing and controlling the affairs of the company. Words cannot be framed more widely and more largely for his protection than those in the order which Younger J. has made. The order is for the appointment of William Cash until further order controller of the company; and it is ordered that his powers as such controller are to be those of a receiver and manager appointed by the Court, "subject nevertheless to and with such modifications, restrictions or extensions as the Court or the judge in chambers may from time to time direct." That is in accordance with s. 3 of the Trading with the Enemy Act, 1914. Then it is ordered "by way of modification or restriction of the powers hereinbefore conferred on the said William Cash as such controller that the said controller is until further order to leave the ordinary conduct of the business

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of the company in the hands of the directors of the company and that the powers so conferred on the said controller as aforesaid are not until further order to be exercised except in so far as may be necessary to enable the said controller to obtain such information as he may require as to the operations or proposed operations of the company or the conduct or management or proposed conduct or management of its business and to prevent the transfer to a new company of the respondent company's business and undertaking which has been proposed by or on behalf of the company as appearing in the evidence." Then there is a proviso as to what should be done if there was any resolution proposed to give effect to that.

In my opinion there was ample jurisdiction on public grounds, and in the public interest, to make this order, and to prevent this which is an English company from becoming a Swiss company. If that were to happen, the shares would be dealt with according to Swiss law. Assuming it to be the same in this respect as English law, which I do, it would enable those shares to be transferred to enemy alien control.

For these reasons I think the order made by Younger J. was perfectly right, and that this appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion, and I should probably add nothing except for the fact that the matter is one of some public interest and importance at the present time.

In November last the Board of Trade applied under the Trading with the Enemy Act, 1914, as amended by the Trading with the Enemy Amendment Act, 1914, for the appointment of a controller of the company in question. The company is an English company incorporated in this country. There are no enemy aliens on the directorate of the company, and the only shares standing in the names of alien enemies are now vested in the custodian. The company owns mines in the State of Bolivia. The produce of these mines is required for the making of munitions. Those who manage the affairs of the company, themselves citizens of a neutral State, have hitherto acted with the utmost loyalty and good faith towards this country. As to that there never has been any question. But for reasons into which it is unnecessary to enter the directors conceived that it would be to the advantage of their shareholders

that the undertaking and the assets of the company should cease to belong to an English company and should be transferred to a new company formed for the express purpose and to be incorporated in and according to the law of Geneva. Those are the short facts upon which the Board of Trade, having formed the opinion that it was expedient in the public interest that a controller should be appointed, applied to the Court for the purpose.

The sections of the two statutes with which we have to deal are s. 3 of the original Act of 1914 and s. 11 of the amending Act. [His Lordship read the material parts of these sections and continued :]

The Board of Trade have in this case come to the conclusion that it is expedient in the public interest to prevent the transfer of the undertaking and the assets of this company—an English company registered in England, carrying on business in England, subject to the jurisdiction of the English Courts, and to the control, so far as may be necessary, of the English executive authorities—to a company to be established in Switzerland which would not be subject to the jurisdiction of these Courts and not subject to the control of our own executive authorities. The Board of Trade have given such evidence in support of the application as tends to show, and does show, that the grounds upon which they have formed their opinion are reasonable. I have just stated what in my view would be the real effect of the transfer of the undertaking and assets to the Swiss company, and it is unnecessary to repeat it; but, that being the effect, I think it obviously follows that it is in the public interest to prevent that transfer from taking place.

It is said, however, that it is inexpedient and not in the public interest to make an order which will interfere with the management of the affairs of the company by the persons who have hitherto controlled it. The answer to that is that the order which has been made does not purport to and will not have the effect (unless indeed those persons make it necessary for the controller to obtain some further direction) of removing the management of the company from those who have hitherto had the management in their hands. The learned judge has taken pains to limit the powers of the controller until other circumstances arise—I sincerely hope they will not—which make it necessary to obtain a more

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drastic measure, and the order so limits the powers of the controller that he is prevented from interfering with the daily and ordinary management of the affairs of this company.

For these reasons I think it is impossible to interfere with the judgment of Younger J., and I agree with all he said except as to one point. So far as I am personally concerned, if it were material to consider in detail the grounds upon which the Board of Trade applied, I should not agree with Younger J. in the view he has expressed as to the second and third of the grounds put forward by the Board of Trade on the motion before him. I think those grounds were justified, and I think they are in fact covered by the reasons which I have just given for my view that the order ought to be supported, and I agree that the appeal ought to be dismissed.

LUSH J. The whole foundation of Mr. Edwardes Jones' argument seems to be this : He has asserted several times during the argument that this order is an order that ought not to have been made against Mr. Aramayo, and that the control is a control that ought not to be exercised over Mr. Aramayo, considering his loyalty, which has never been impugned, and considering the way in which hitherto he has managed the affairs of the company. Mr. Edwardes Jones has declaimed against what he has called an attack upon Mr. Aramayo involved in the making of this order. In my opinion that view involves an entire misapprehension. The order is not an order made against Mr. Aramayo. The control is not a control to be exercised over Mr. Aramayo. The controller is appointed to control an English company, and when once one gets rid of the notion that Mr. Edwardes Jones has given expression to, namely, that the order is made against Mr. Aramayo personally, the whole difficulty that he has raised disappears.

The section under which this order has been made is a section which Mr. Edwardes Jones has contended is controlled by the preamble to the second of the two Acts. When one looks at s. 11 it will be found that it is a section which enlarges the grounds upon which the Board of Trade may apply for the appointment of the controller under s. 3 of the earlier Act, and it enlarges the power of the Court to make that appointment. When one turns to the earlier Act, one sees that there is no preamble, and that there is no

restriction upon the plain language of s. 3. That being so, it seems to me quite plain that there was ample material here upon which Younger J. could make the order that he did, and that it was rightly made I cannot entertain the least doubt. It is obvious that the proposed change, if made, is a change which would be fraught with possible or even probable danger to this country. That being so, there were ample grounds upon which the order ought to be made.

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Solicitors : *Dale & Co. ; Solicitor to the Board of Trade.*

W I. C

In re ANGLO-CUBAN OIL, BITUMEN, AND ASPHALT
COMPANY, LIMITED.

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Company—Memorandum of Association—Construction—Statement of Objects—Ancillary Powers—Declaration that all Clauses independent—Ultra vires—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 3.

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The memorandum of association of the E. Company contained an objects clause with thirty sub-clauses enabling the company to carry on almost every conceivable kind of business which a company could adopt. Sub-clause 1 authorized the company to acquire, take over, work, and develop any licences, concessions, estates, plantations, and properties, and in particular four specified licences to collect rubber, balata, and other like substances from the Crown lands of a British Colony; and sub-clause 12 authorized the company to buy or otherwise acquire in any way and hold, sell, or deal with or in any stocks or shares of any company; and the objects clause concluded with a declaration that every sub-clause should be construed as a substantive clause and not limited or restricted by reference to any other sub-clause or by the name of the company, and that none of such sub-clauses or the objects specified therein should be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause.

The E. Company underwrote and had allotted to it shares in the A. Company, and these shares were transferred to the L. Company.

All three companies being in liquidation, the liquidator of the A. Company settled the L. Company on the A list of contributories and the E. Company on the B list in respect of these shares.

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On an application by the liquidator of the E. Company to vary the B list by striking out that company's name on the ground that the underwriting was ultra vires that company :—

Held by the Court of Appeal, affirming the decision of Neville J., that the memorandum must be construed according to its literal meaning and that the underwriting was intra vires.

In re German Date Coffee Co. (1882) 20 Ch. D. 169, *In re Crown Bank* (1890) 44 Ch. D. 634, and *Stephens v. Mysore Reefs (Kangundy) Mining Co.* [1902] 1 Ch. 745 discussed.

Observations of Warrington L.J. and Lawrence J. as to whether such a memorandum complied with s. 3 of the Companies (Consolidation) Act, 1908.

THIS summons was taken out in the winding up of the Anglo-Cuban Oil, Bitumen, and Asphalt Company, Limited (hereinafter called the Anglo-Cuban Company), by the liquidator of the Essequibo Rubber and Estates Company, Limited (hereinafter called the Essequibo Company), asking that, notwithstanding that the time for appealing for a variation of the B list of contributories had expired, the time might be enlarged, and that the B list of contributories and the liquidator's certificate finally settling the same might be varied by excluding therefrom the name of the Essequibo Company.

The Essequibo Company was incorporated on April 6, 1912, mainly to take over and work four licences to prospect for rubber and balata which had been originally granted to a Chinaman for 100 dollars.

Clause 3 of the memorandum of association contained thirty sub-clauses covering almost every conceivable object which a company could legally adopt, and amongst them the following :—

“(1.) To acquire, take over, work and develop any licence, concessions, estates, plantations and properties, and in particular four certain licences to collect rubber, balata and other like substances from the Crown lands of the Colony of British Guiana, and with a view thereto to enter into the agreement referred to in clause 4 of the company's articles of association, and to carry the same into effect with or without modification.”

“(2.) To carry on the business of planters, cultivators, collectors, manufacturers, merchants, sellers and dealers in rubber, balata, tea, coffee, cocoa, gutta-percha, gums and other products, goods, materials and substances of any and every description.”

“(5.) To work mines or quarries . . . and generally to carry on the business of mining in all its branches.”

“(8.) To promote, form, issue, and be interested in any company or companies, either in Great Britain, British Guiana or elsewhere, and take and acquire, hold, transfer, sell, surrender, or otherwise dispose of and deal in shares, stocks, bonds, obligations, debentures, debenture stock, scrip or securities in or of any such company, and to transfer to any such company any property of this company, and to subsidise or otherwise assist any such company; and in the event of any property sold to such company proving unsatisfactory, to make over to it, gratuitously or otherwise, any other property or rights, either in lieu of the property sold or transferred or otherwise.”

“(9.) To undertake or aid any enterprise, and carry out any transactions or operations whatsoever which may be lawfully undertaken and carried out by capitalists, and to carry on a general financial business and general financial operations of all kinds in any part of the world.”

“(12.) To buy or otherwise acquire in any way, and hold, sell or deal with or in any stocks, shares, securities or obligations of any Government, authority, corporation or company which may be considered capable of being profitably held or dealt in or with by the company.”

“(30.) To do all such other things as are in the opinion of the directors incidental or conducive to the attainment of the above objects, and so that the word ‘company’ throughout this clause shall be deemed to include any Government, body, authority, partnership, association, or other body of persons whether incorporated or not, and whether registered or domiciled in the United Kingdom or elsewhere.”

Clause 3 concluded with the following declaration: “The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses, or the objects therein specified, or the powers thereby conferred, shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full

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power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property, or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause."

Clause 4 of the articles of association, referred to in sub-clause 1 of clause 3 of the memorandum, provided for the adoption by the company, and carrying out by its directors, of an agreement between Industrial Selections, Limited, and the company.

One Joseph Chansay was the promoter of the Anglo-Cuban Company, the Essequibo Company, and several other companies whose affairs were more or less mixed up together.

Chansay proposed to the directors of the Essequibo Company that that company should sub-underwrite 20,000 shares of 10s. each in the Anglo-Cuban Company, which had been underwritten by himself or others, for a commission of 600*l.* in cash and 5000*l.* in cash or shares, Chansay undertaking to purchase at par on or before November 30, 1911, any shares which the Essequibo Company might have to take up. The Essequibo Company were advised by their own solicitors that the proposed transaction was not within their powers, but afterwards being advised by another firm of solicitors that it was within their powers, they underwrote the shares, and 17,200 shares in the Anglo-Cuban Company were allotted to the Essequibo Company in respect of this underwriting transaction. On these the Essequibo Company paid 6*s.* per share, amounting to 5160*l.* This sum was owed by Chansay to the Essequibo Company, and some but not all of it had been paid before the winding up of either company. No part of the remaining 4*s.* per share, amounting to 3440*l.*, was paid to the Anglo-Cuban Company before April 12, 1912, when that company issued a writ against the Essequibo Company for 3723*l.* 4*s.* 1*d.*, being the 4*s.* per share with arrears of interest; 2000*l.*, part of this sum, was paid by Chansay, and on September 6, 1912, the shares were registered in the name of the London and Mexican Exploitation Company as nominees of Chansay in pursuance of his contract to take up the shares.

On April 15, 1912, the Essequibo Company was ordered to be wound up, and on November 4, 1912, a liquidator was appointed.

On November 12, 1912, the Anglo-Cuban Company was ordered to be wound up compulsorily.

On May 14, 1912, the official receiver, as liquidator of the Anglo-Cuban Company, settled the London and Mexican Exploitation Company on the A list of contributories for the said 17,200 shares, on which there was then a liability of 144*l.* 15*s.* 6*d.*, and on April 13, 1916, he settled the Essequibo Company on the B list for the same shares.

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This summons was taken out on October 19, 1916. The summons was heard before NEVILLE J. on December 12, 1916.

On the question of extension of time for appealing, which does not require a report, NEVILLE J. held that the time ought to be extended. The case was then argued on the question of *ultra vires*.

Jenkins, K.C., and *P. B. Morle*, for the summons. It has been settled by many cases that an objects clause in the memorandum which enables the company to carry on any kind of business whatever in any country in the world does not fulfil the requirement of the Companies Acts that the memorandum must state the objects of the company. All such wide clauses as are contained in this memorandum must be construed so as to confine them to objects which the name of the company and the first sub-clauses show to be the primary objects of the company: *In re German Date Coffee Co.* (1); *In re Crown Bank* (2); *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (3)

Hon. Frank Russell, K.C., and *A. F. Topham*, for the liquidator of the Anglo-Cuban Company were not called upon.

NEVILLE J. The Companies (Consolidation) Act, 1908, requires that the purposes of a company shall be declared in the memorandum of association, and that the Registrar of Joint Stock Companies shall approve the memorandum before it is put on the file. The memorandum of association of the Essequibo Company was so approved by the registrar. By reason of certain decisions which laid down that in interpreting and construing the memorandum all the objects stated which were not main objects must

(1) 20 Ch. D. 169.

(2) 44 Ch. D. 634.

(3) [1902] 1 Ch. 745.

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be construed as merely ancillary to the main objects or object, companies were sometimes hampered in undertaking business which was not clearly ancillary to the main objects or object of the company. Consequently clause after clause was added to the precedents for such memoranda by draftsmen, till it seemed to have become the ruling intention in drawing up a memorandum to provide that no legal object for a company should possibly be ultra vires. So far as I know, the cases hitherto decided on this point have all been cases between shareholders and the company, the decisions have been for the protection of the shareholders, and the reason given has been that traps must not be set for shareholders. I have had several cases cited to me, but it is not a question of following or not following them; the case here is different, and the only question is, what is the interpretation of this particular memorandum? The liquidator of the Essequibo Company claims that underwriting shares in the Anglo-Cuban Company is ultra vires the memorandum of association of his company, and that therefore his company is not liable to the Anglo-Cuban Company in respect of such underwriting. The memorandum in question is in accordance with the requirements of and purports to obey the directions of the Act of Parliament, and, as I have said, has been approved by the registrar. The memorandum must be construed in the same way as any other document, and the general objects for which the company is formed may be looked at. If I find some words in the memorandum equivocal I have a right to have light thrown on their meaning by the surrounding facts; but where, as here, the words are free from all doubt whatever I am not entitled to disregard them. [His Lordship read sub-clause 12 of clause 3 of the memorandum and continued:] That seems to me to cover every conceivable mode of dealing with shares.

Then it is said that this being a memorandum of association has to be construed in a particular manner, and that you must confine dealings under sub-clause 12 of clause 3 to such as are ancillary only to the main objects of the company. Clause 3 of the memorandum, however, declares that the objects of the company set forth in any sub-clause of that clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause or by the

name of the company ; and that declaration is clear, but for the decisions the effect of which I have referred to. Then clause 3 continues : [His Lordship read the rest of the clause.] From that it is clear that I must not and cannot interpret these sub-clauses as being merely subsidiary to the objects in the first sub-clause. The liability, therefore, of the Essequibo Company is complete, and the present application must fail.

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The liquidator of the Essequibo Company appealed. The appeal was heard on February 5, 1917.

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Jenkins, K.C., and *P. B. Morle*, for the appellant. The underwriting transaction was ultra vires the Essequibo Company, and that company was therefore wrongly placed on the B list of contributories of the Anglo-Cuban Company. The Court has laid down as a rule of construction that when once it finds in the memorandum of association what is the primary object of the company it will treat the other objects as merely ancillary to that primary object : *In re German Date Coffee Co.* (1) ; *In re Haven Gold Mining Co.* (2) The primary object of the Essequibo Company, as stated in sub-clause 1 of clause 3 of the memorandum, was to acquire and work certain licences to collect rubber, balata, and other like substances, and the objects stated in the subsequent sub-clauses were merely ancillary to that primary object. Sect. 3 of the Companies (Consolidation) Act, 1908, provides that the memorandum must state the objects of the company. If it is competent to a company, as here, to state everything as an object of the company, then there is no use in stating the objects. The declaration at the end of clause 3 of the memorandum that none of the objects are to be deemed ancillary is ineffectual if the Court finds upon the construction of the memorandum that there is a dominant object : *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (3) The name of the company is material in determining what is the main object of the company.

[WARRINGTON L.J. If the memorandum does not comply with s. 3 of the Companies (Consolidation) Act, 1908, this company ought never to have been on the register.]

(1) 20 Ch. D. 169.

(2) (1882) 20 Ch. D. 151.

(3) [1902] 1 Ch. 745.

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There does not appear to be any reported case in which the registrar has refused to register a company on the ground that the memorandum did not comply with the Act. The mere registration of a company will not confer upon it powers which it would not otherwise be entitled to. What the appellant complains of is the application of the capital of the Essequibo Company for an object entirely different from that for which the company was formed to carry out.

[WARRINGTON L.J. referred to sub-clauses 8 and 12.]

Those clauses cannot, it is submitted, be construed as conferring independent powers on the company. The evil of reading ancillary as paramount objects was pointed out by Lindley L.J. in *In re Coolgardie Consolidated Gold Mines, Ltd.* (1) In *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (2) Swinfen Eady J. said that "A mere stringing together of a large number of very wide powers does not satisfy" s. 3 of the Act.

[WARRINGTON L.J. The judgment in that case depended on the construction of a clause which we have not got here.]

Hon. Frank Russell, K.C., and *A. F. Topham*, for the respondent liquidator of the Anglo-Cuban Company, were not called upon to argue.

LORD COZENS-HARDY M.R. This is an appeal by the liquidator of the Essequibo Company from an order of Neville J. to the effect that it was *intra vires* that company to take the shares in respect of which it has been placed on the B list of contributories of the Anglo-Cuban Company.

The question really is reduced to a narrow point, and that is whether the memorandum of association of the Essequibo Company is so framed that it is not *intra vires* that company to take shares in another company, not being a company in any way connected with the special company mentioned in the memorandum and in article 4 of the articles of association. The memorandum of association, to which I must call attention, seems to me to be a very bad specimen of what I think is a very bad practice which has grown up of recent years. When I was young at the Bar the memorandum of association in the case of very large companies as well as of smaller

(1) (1897) 76 L. T. 269, 271.

(2) [1902] 1 Ch. 745, 750.

ones contained very few special objects. There was one object or possibly two objects stated, and then a few general words, "together with the other objects conducive" or "similar thereto," or words to that effect. Now we are familiar with an enumeration of objects which extends the full length of the alphabet, and sometimes beyond it, so that you get sub-clauses (*aa*) and (*bb*) after you have exhausted all the other letters. Here we have a company with twenty-nine special objects. The thirtieth is also called an object, and then there is a declaration to which I must call attention. We must treat this as a question of construction of the memorandum. The first object is : [His Lordship read sub-clause 1 and continued :] When we look at clause 4 of the articles of association we see that it refers to what we have been told was an option granted to a Chinaman for certain rights in a certain district in British Guiana. The name of the Chinaman has disappeared from that, and the Industrial Selections, Limited, I suppose, must be treated as the assignee of the Chinaman. The Chinaman got a very small sum of money for the licences. The company, apparently having regard to the modification of the amount, got a considerable sum for them. The Essequibo Company was bound to adopt this agreement, and the vendor was to have the right to nominate himself or some fit and proper person a director of the company. The Industrial Selections, Limited, I take it, was the promoter of the Essequibo Company, of the Anglo-Cuban Company, and also of the London and Mexican Exploitation Company, all of which are mixed up in this transaction. Then the memorandum goes on to state the other objects for which the company was established. [His Lordship read sub-clause 2 and continued :] I need only refer to a few of the objects. Sub-clause 5 is perfectly general ; it is to work mines or quarries and generally to carry on the business of mining in all its branches. [His Lordship read sub-clauses 9 and 12 and continued :] There are a great number of other objects, including sub-clause 27, which introduces charitable and religious objects into the objects of the company. Then we come to the declaration at the end of clause 3 : "The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in anywise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of

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the company.” Those words seem to have been inserted with the express object of escaping from the decision in *In re German Date Coffee Co.* (1) Then the declaration goes on : [His Lordship read the remainder of the declaration and continued :]

As a matter of construction it seems to me impossible to hold that the objects stated in sub-clauses 1 and 2, taken together, can be regarded as essential, and that the other objects stated in the subsequent sub-clauses are merely to be ancillary to those objects. Language has no meaning if we are to take that view. This is an attempt—it may be the first time that such a case has come before the Court—to get rid of the substratum cases and to say that each one of these objects—for instance the working of mines and quarries mentioned in sub-clause 5—shall be held to be an independent object and not to be tied up with or merely ancillary to the object of acquiring the licences granted to the Chinaman.

Then it is said that the substratum cases may still apply, and I think that may be so. It may be that there would be good ground for winding up this company, if it was not already being wound up, on the substratum cases. The Essequibo Company was wound up and we are told, although we have not had any very exact statement, that it was on the ground that its substratum was gone, notwithstanding that the company did acquire these licences granted to the Chinaman. But that does not settle the question at all as to whether this particular transaction was or was not ultra vires the Essequibo Company. In my opinion it was not. The question whether the substratum is gone is altogether a different one from the question whether the particular act in this case is ultra vires. That being so, unless we are to say that the whole of the declaration at the end of clause 3 is to be struck out, it seems to me that the view taken by Neville J. was correct. There is no doubt upon the construction. It is not a case in which, the matter being in doubt, we should take one view rather than the other. The words are too clear to admit of anything of that kind. That being so, on the grounds put, as I understand, by Neville J., of whose judgment we have only had a short note, I think his decision is perfectly right, and that the Essequibo Company was properly placed upon the B list of contributories for the amount agreed upon between the

parties, namely, 1446*l.* 15*s.* 6*d.* For these reasons I think that the appeal fails and must be dismissed with costs.

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WARRINGTON L.J. I am of the same opinion, and so far as the question before us is concerned, which is purely one of construction, I have nothing to add. But we are dealing here with a memorandum of association such as I think no member of the Court has ever seen before, because the effect of it appears to me to be almost, if not quite, to state as the objects of the company anything which any unincorporated body of persons might do in the way of business. Speaking for myself, I think it is quite possible that such a memorandum might on due consideration be held not to be in compliance with s. 3 of the Companies (Consolidation) Act, 1908, and if it is not in compliance with that section, then the parties proposing to register the company would have no right to insist on its being registered and incorporated. Sect. 2 of the Act provides that “Any seven or more persons”—leaving out immaterial words—“associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability”; and s. 3 provides that in the case of a company limited by shares the memorandum must state the objects of the company. The registrar, therefore, it seems to me, is not bound to register a company if the parties proposing to register it produce a document which is not a memorandum of association complying with the provisions of s. 3. I express no opinion, because the matter is not before us, as to whether or not such a memorandum as the present is such a memorandum as is contemplated by s. 3, but I do say this, that I cannot help expressing the hope that the registrar may in some such case as this refuse to register a company with such a memorandum as we have before us, in order that the opinion of the Court may be taken upon the question whether or not it is a compliance with the Act of Parliament. I agree that the appeal must be dismissed.

LAWRENCE J. I am of the same opinion. I do not think I can usefully add anything upon the construction of the memorandum. It seems to me that Neville J. was quite right in the conclusion

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at which he arrived. The words of the memorandum are plainly such as include the taking of these shares, and the declaration at the end of clause 3 makes it impossible to say that the taking of shares is to be deemed subsidiary. The present case does not come within any of the cases that have been cited, and I entirely agree with what has been said about the propriety of registering a memorandum having such wide objects as this. It really does not state any definite objects of this company. It includes almost everything that one can think of as an object of the company and winds up by saying that none of them is to be deemed subsidiary or auxiliary merely to the others. That seems to me to be a form of memorandum which was not intended by the Act, and it is certainly not a desirable precedent to be followed in the future.

Solicitors for appellant: *Sparks, Whitehouse, Russell & Co.*

Solicitors for respondent: *Stanley Evans & Co.*

W. I. C.

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[1915 D. 477.]

*Mines—Surface Owner—Right to Support—Partition—Exception of
Mines and Minerals—Power to enter for the Working of the Minerals
“in as full and ample a manner as if these presents had not been
made”—No Compensation Clause—Implied Right to let down
Surface.*

By a deed of partition made in 1788 certain lands were partitioned in severalty between certain tenants in common, with an exception and reservation of the mines and minerals in and upon the said lands, with liberty for the tenants in common, their heirs and assigns, to “enter on the said premises to work and convert the same to the most advantage for their mutual benefit.” The deed contained a further provision and declaration that the mines and minerals already opened and unopened in, upon, or under the said lands were thereby expressly reserved and excepted out of the partition of the said lands for the joint profit, benefit, and advantage of the tenants in common, their heirs and assigns, with full and free liberty for the tenants in common, their heirs and assigns, their agents, servants, workmen, horses, cattle, carts and carriages whatsoever, at all times to enter upon the said lands and every part and parcel thereof for the working, carrying, and converting of

the said mines and minerals for the equal and joint benefit, profit, and advantage of the tenants in common, their heirs and assigns, and every person lawfully claiming under them respectively, "in as full and ample a manner to all intents and purposes as if these presents and the partition and division" of the said lands had not been done and made. The deed contained no clause providing for compensation for injury to the surface. The plaintiffs derived title to the land, and the defendant company derived title to the mines and minerals through this deed. On a question of law whether the defendant company was entitled to work the minerals so as to cause the surface to subside:—

Held, by the Court of Appeal, affirming the decision of Younger J., that as a matter of construction the words "in as full and ample a manner to all intents and purposes as if these presents, &c., had not been done and made" applied to the power of working the minerals and not merely to the power of entry on the land, and that on this construction the plaintiffs' common law right to support was by necessary implication displaced, and that the defendant company had a right to work the minerals so as to cause the surface and buildings thereon to subside.

The cases considered and *Beard v. Moira Colliery Co.* [1915] 1 Ch. 257 followed.

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POINT OF LAW set down for hearing under Order xxv., r. 2.

Immediately before the execution of the partition deed presently mentioned certain hereditaments in the counties of Glamorgan and Brecon, with all the mines and minerals therein, stood limited by virtue of a marriage settlement dated December 10, 1747, to the use of Edward Mathew for life, with remainder to the use of John Curre and Rebecca his wife in her right, Thynne Howe Gwynne and Maria Elinora his wife in her right, and Hugh Lord and Eleanor his wife in her right, as tenants in common, and the heirs of the bodies of the said Rebecca Curre, Maria Elinora Gwynne, and Eleanor Lord respectively.

In the year 1788 a partition of these hereditaments was effected with an exception of mines and minerals. This partition was carried out by an indenture of release dated February 23, 1788, founded on a lease for a year, and made between the said Edward Mathew and Mary his wife of the first part, the said John Curre and Rebecca his wife of the second part, the said Thynne Howe Gwynne and Maria Elinora his wife of the third part, the said Hugh Lord and Eleanor his wife of the fourth part, Robert Banks Hodgkinson and Edward Lewis of the fifth part, and the Right

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Hon. John Lord Chedworth and Jefferys Wilkins of the sixth part, and perfected by a fine shortly afterwards duly levied pursuant to covenants in that behalf therein contained, whereby all the manors, messuages, and lands ("the veins and seams of copper, lead, iron ore, coal, and other mines and minerals, in and upon all and singular the said manors, messuages, lands, and premises, and every part thereof, with full and free liberty at all times hereafter for the said Edward Mathew during his life, and for the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, and Hugh Lord and Eleanor his wife, his, her and their heirs and assigns, their agents, servants, workmen, horses, cattle, and carriages, to enter on the said premises to work and convert the same to the most advantage for their mutual benefit always excepted and reserved out of this grant and conveyance") were granted as to parts thereof representing two third shares in severalty to the uses therein mentioned and as to other part thereof representing the remaining third share, which included certain lands situate at Cwaman, Aberdare, in the county of Glamorgan, to the use of the said Edward Mathew and his assigns during his life, with remainder to uses in favour of Hugh Lord and Eleanor his wife and the heirs of the body of Eleanor Lord begotten by Hugh Lord. And the said indenture contained the following proviso: "Provided always nevertheless and it is hereby declared and agreed by and between the said Edward Mathew, John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife, and every of them, and their true intent and meaning respectively are that all and all manner of veins and seams of copper, lead, iron ore, coal and all and every other mines and minerals whatsoever, already opened and unopened or at any time hereafter to be opened and found in, upon or under all or any of the aforesaid manors, messuages, lands, tenements and premises, or in, upon or under any part or parcel thereof, mentioned and comprised in the aforesaid marriage settlement of December 10, 1747, and divided and limited in three equal parts or shares after the decease of the said Edward Mathew in manner hereinbefore mentioned, are hereby expressly reserved and excepted out of the aforesaid partition and division of the said manors, messuages, lands and premises, for the benefit, profit and advantage of the said Edward Mathew and his

assigns for his life, and after his decease for the joint profit, benefit and advantage of the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife, and of all and every other person and persons, his, her and their heirs and assigns, who are interested in and entitled to the said manors, messuages, lands and premises, previous to the execution of these presents, and full and free liberty for the said Edward Mathew and his assigns during his natural life, and also for the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife, his, her and their respective heirs and assigns (after the decease of the said Edward Mathew), his, her and their agents, servants, workmen, horses, cattle, carts and carriages whatsoever, at all times and seasons hereafter to enter upon the said manors, messuages, lands and premises, and every part and parcel thereof, for the working, carrying and converting of the said veins and seams of copper, lead, iron ore, coal and other mines and minerals, and every part thereof, for the equal and joint benefit, profit and advantage of the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, and Hugh Lord and Eleanor his wife, their heirs and assigns, and every person or persons whatsoever lawfully claiming under them respectively, in as full and ample manner to all intents and purposes as if these presents and the partition and division of the said manors, messuages, lands and premises as aforesaid, had not been done and made, anything hereinbefore contained to the contrary thereof in any wise notwithstanding."

The plaintiffs in this action derived title to the surface of the land in question situate at Cwaman, Aberdare, and the defendant company derived title to the mines and minerals thereunder through this deed.

The plaintiffs alleged that some time in or prior to the year 1911 the defendant company worked the mines in and under the said piece of land and in and under the adjoining lands in such a way as to cause the said piece of land and the buildings standing thereon to subside. They also alleged that some of the buildings were erected in the years 1891 and 1892 and others were subsequently erected in substitution for buildings then erected, and that the plaintiffs were therefore entitled to have not merely the land but

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The defendant company by its defence alleged that if (which it did not admit) the defendant company had worked the said mines in such a way as to cause the said piece of land or the buildings standing thereon to subside, the defendant company was entitled so to work the same by virtue of the exceptions, reservations, agreements, and declarations in the deed of partition contained.

By an order dated July 24, 1916, made at the instance of the defendant company under Order xxv., r. 2, the following point of law raised by the pleadings was set down to be disposed of before the trial of the action, namely, whether, by virtue of the exceptions, reservations, agreements, and declarations in the indenture of February 23, 1788, contained, the defendant company was at all material times and is entitled so to work the mines and minerals within and under the plaintiffs' land in such a way as to cause the surface of the same lands or buildings standing thereon to subside.

The point of law came on for hearing before Younger J. on October 20, 1916.

*Clauson, K.C.*, and *J. G. Wood*, for the defendant company. It is submitted that the owner of the surface was deprived of the right of support. The law to be applied to the construction of the document in the present case is that laid down in *Beard v. Moira Colliery Co.* (1) It was there held that a clause like that in the present case is to be construed according to general principles of construction, and that the rule applicable to the construction of similar clauses in Inclosure Acts is *sui generis* and ought not to be applied to other documents. [They also referred to the decision of the House of Lords in *Chamber Colliery Co. v. Twyerould*. (2)] The partition deed in the present case in unambiguous terms reserves power to work the minerals "in as full and ample a manner to all intents and purposes" as if the partition had not been made, and this is quite inconsistent with the alleged continuance of the common law right of support.

*H. Terrell, K.C.*, and *MacSwinnery*, for the plaintiffs. Where

(1) [1915] 1 Ch. 257.

(2) (1893) [1915] 1 Ch. 268, n.

there is a severance of ownership by deed of the surface and minerals the owner of the surface is entitled to support unless he is deprived of it by an express grant to the owner of the minerals of a right to let down the surface or where such right is necessarily to be implied : see *Davis v. Treharne* (1), per Lord Blackburn ; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (2) In considering whether the common law right of support has been taken away two circumstances have been treated as especially important—first, whether it was in the contemplation of the parties at the time of the severance that the working of the minerals would cause a subsidence : *Butterley Co. v. New Hucknall Colliery Co.* (3) ; and, secondly, whether there is or is not a clause for complete compensation for damage caused by subsidence. Here it is not alleged, and there is no evidence to show, that the parties contemplated any damage by subsidence, which could hardly have been the case in the year 1788, and the deed itself contains no clause at all providing for compensation.

The absence of a sufficient clause of compensation is, according to Lord Macnaghten in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (4), some indication that the ordinary rights of the surface owner were intended to be left untouched, while the presence of a compensation clause which is inappropriate to damage by subsidence is cogent evidence to prove that subsidence was not contemplated. Lord Davey in the same case (5) puts it more strongly and says : “ If there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law rule was intended to apply.” Those observations are directly applicable to the present case. It is said that the present case is undistinguishable from *Beard v. Moira Colliery Co.* (6), but the language of the deed in that case and the language of the deed in the present case are by no means identical. In approaching the construction of the deed it must be borne in mind that all deeds which effect a severance of the surface and the mines and minerals are to some degree *sui generis* and are not to be construed according to strict grammar only, but that the *prima facie* right of support is

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(1) (1881) 6 App. Cas. 460, 466.

(2) [1906] A. C. 305.

(3) [1910] A. C. 381.

(4) [1906] A. C. 314.

(5) [1906] A. C. 315.

(6) [1915] 1 Ch. 257.

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always to be read into the deed if it admits of such an interpretation. "The same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced": per Lord Loreburn L.C. in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1) The language of the exception and reservation of the mines and minerals from the grant in the present case contains nothing to raise any implication that the right of support was intended to be abandoned, and the language of the proviso which follows contains nothing which renders such an implication necessary. As a question of construction the words "in as full and ample a manner to all intents and purposes as if these presents . . . had not been done and made" apply to the power of entry on the land and not to the power of working the minerals, and on this construction there is no inconsistency at all between the terms of the deed and the common law right of support. An express power of entry giving extensive rights over the surface is a useful adjunct to the power to work: *Earl Cardigan v. Armitage*. (2) In *Beard v. Moira Colliery Co.* (3) what happened was this: Eve J. held that, on the evidence before the Court as to the state of knowledge existing at the time (the year 1829), the parties to the deed contemplated that the minerals might be worked in a manner which would let down the surface, and in construing the deed, having regard to this evidence, held that the vendor must be taken to have reserved the right to let down the surface, but added that if he were wrong on this point then the plaintiffs were entitled to succeed, and proceeded to estimate the damage. On the hearing of the appeal the Court intimated that they disagreed with Eve J. as to the effect of the evidence so far as related to deep level workings, but affirmed his decision dismissing the action on the ground that the cases under Inclosure Acts had no application to the construction of a deed, and that the language of the deed standing alone was in their judgment inconsistent with the common law right of support. It was also admitted in argument on the appeal that the compensation clause did not amount to a licence to let down the surface, but only applied to surface workings.

(1) [1906] A. C. 309.

(2) (1823) 2 B. & C. 197, 211.

(3) [1915] 1 Ch. 257.

*Clauson, K.C.*, in reply. The absence of a clause of compensation is no doubt "some indication that the ordinary rights of the surface owner were intended to be left untouched": per Lord Macnaghten in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1); but it cannot outweigh the plain language of the deed. If there is any discrepancy between the language of Lord Davey (2) and that of Lord Macnaghten on this point the language of Lord Macnaghten is to be preferred.

*Cur. adv. vult.*

1916. Oct. 31. YOUNGER J. stated the question of law and referred to the material parts of the partition deed, reading at length the clause of reservation and the subsequent proviso, and continued: Now with regard to these two clauses it was conceded in the argument by Mr. Clauson on behalf of the defendants that if the clause of reservation stood alone it would not be possible for him to contend that that reservation was sufficient to entitle the mineral owners to let down the surface in the course of their working; but the question, and the serious question, is whether the proviso and declaration which are contained in the latter part of the deed, and which I have just read, are sufficient for that purpose.

That question depends first of all upon what is the true construction of the proviso and declaration. On that point it is contended by Mr. Terrell for the plaintiffs that, the reservation of the mines and the liberty to work them having been previously expressed in the deed in the terms to which the parties presumably had agreed, the object of this latter clause was merely to confer an express and full power of entry upon the surface, and that its only effect as matter of construction is to confer upon the mineral owners a right to enter upon the surface in as full and ample a manner to all intents and purposes as if the deed and the partition and division of the said manors, messuages, lands, and premises thereby affected had not been done and made. Now I cannot agree with that view. These later words which I have just read are in my opinion in point of grammar dependent on the words "working, carrying and converting," and they are not dependent on the word "entry." It is

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agreed as a matter of construction that the words immediately preceding, namely, "working, &c., for the equal and joint benefit, profit, and advantage" of the said three owners, are dependent upon the words "working," &c., and not upon the word "entry," and it seems to me clear as a pure question of grammar that the words at the end of the clause upon which the question turns are dependent also upon the same words. Moreover, the power to enter as apart from its object has already in the earlier part of the clause been conferred upon the mineral owners in the widest appropriate terms. That entry, it will be remembered, might be an entry by the mineral owners, their agents, servants, workmen, horses, cattle, carts, and carriages whatsoever. It might be made at all times and seasons thereafter. It might be made upon the said manors, messuages, and premises and every part and parcel thereof. So wide, indeed, is the effect of all these words that it was, I think, agreed by Mr. MacSwinney that if the later words or the last words of the clause also related to the power of entry as distinct from its purpose, then he was unable to suggest that they added anything to the power in that behalf previously conferred. Their effect, however, if they are made to depend upon the words "working," &c., is very marked, and accordingly I think that, whether the question be looked at as a question of grammar, or whether it be regarded as a question of good sense, the reservation of minerals in this deed carries with it a power to work them in as full and ample a manner to all intents and purposes as if the deed and the partition and division of the said manors, messuages, lands, and premises aforesaid had not been done and made. The question therefore is, Does that power or right enable the mineral owners, if they are so minded, to work these minerals so as to cause the surface to subside?

Now the general principles applicable to the determination of questions like that have been expounded in many cases. The effect of them may be conveniently taken from the speech of Lord Macnaghten in the case of *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1) "The result," says Lord Macnaghten, "seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different

(1) [1906] A. C. 313.

hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of severance is a lease, or a deed of grant or reservation, or an Inclosure Act or award. To exclude the presumption it is not enough that mining rights have been reserved or granted in the largest terms imaginable, or that powers and privileges usually found in mining grants are conferred without stint, or that compensation is provided in measure adequate or more than adequate to cover any damage likely to be occasioned by the exercise of those powers and privileges." In the last important case on the subject, namely, the case of *Beard v. Moira Colliery Co.* (1), Swinfen Eady L.J., after citing that passage, sums up the position thus: "It is therefore a question in each case of the proper construction of the instrument of severance, and unless the power to let down the surface be found there expressly or by necessary implication, the common law right of the surface owner to support will prevail. The mere fact of giving very wide general powers to sink pits and to work, get, and carry away coal does not of itself establish a right to get rid of the common law right of the surface owner to have his surface undisturbed." But in addition to such general statements as these the Courts have frequently indicated matters found in such deeds which are of assistance in determining whether or not in a case where there is no express power to let down the surface there is a necessary implication that the surface shall be so let down. For example, one principle of construction specially valuable in such cases is that expressed by Lord Blackburn in *River Wear Commissioners v. Adamson* (2) in a passage of his judgment which is referred to with approval by Lord Halsbury in the *Butterley Case*. (3) There Lord Blackburn says, in construing a document, "in all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of

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(1) [1915] 1 Ch. 264.

(2) (1877) 2 App. Cas. 743, 763.

(3) [1910] A. C. 382.

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language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." And two other circumstances are frequently referred to as being of importance in relation to this matter; one is the presence in or absence from the deed of any provision for compensation to the surface owner in respect of damage to the surface, and the other is the circumstance whether the minerals by the deed in question have been granted or whether they have been reserved. In the present case there is no provision for compensation to be found in the deed; in the present case the minerals are not granted; the minerals are reserved. With reference to these two matters Farwell J. in the *Butterknowle Case* (1) says this: "The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support. So also is the presence of a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury to buildings or other injury resulting from subsidence is in favour of the destruction of the right." Then a little later on he says: "It is important to ascertain whether the mineral owner's rights are merely reserved or whether they are newly created by grant. In the latter case there is more ground than in the former for the argument that the ordinary common law right of support has been displaced." To those observations may be added one of Lord Davey's in the *Butterknowle Case* (2), where he says—and this applies to the present case—"If there is no provision for giving compensation for the injury done to the surface, it is almost conclusive that the common law rule was intended to apply." That is to say, the right of support is not taken away. With regard to this matter, however, Lord Macnaghten in the same case takes a somewhat different view. He says this (3): "Although provision for compensation is not of itself sufficient to shew that the mine

(1) [1904] 2 Ch. 419, 425.

(2) [1906] A. C. 315.

(3) [1906] A. C. 314

owner working in the usual and proper manner is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched. On the other hand, the presence of a provision for compensation, which is obviously inadequate or plainly inappropriate if applied to damage by subsidence, is cogent evidence to prove that subsidence was not contemplated." Both of these noble and learned Lords are, however, agreed that either circumstance is a relevant one for consideration.

Applying Lord Blackburn's principle it will be found that in construing these deeds mining knowledge at the date of the instrument has often been regarded as of importance. In this connection it should be noted that in the present case the minerals are deep level workings, and it is not even alleged by the defendants that the parties to the deed in the year 1788 must necessarily have contemplated that the extraction of the minerals from such levels would inevitably bring down the surface. Accordingly in construing this deed the views enunciated by Lord President Inglis in *White v. Dixon* (1) and cited with approval by Lord Macnaghten in the following passage from his judgment in the *Butterley Case* (2) would appear to be important. "There only remains for consideration the title which the pursuers have to the six and a half acres, which disposition was granted the year before the disposition of the minerals"—that was in 1799. 'Now, undoubtedly there is a clause there which is much more difficult to construe than any of those I have hitherto dealt with. . . . The words which cause the difficulty of construction are these—"upon paying any damage that may be occasioned to the said lands by working of the said metals and minerals." This may mean any damage that may be occasioned to the surface of the lands by any operations which may be performed by the mineral owner, without inquiring or specifying what these operations may be; or it may mean, as contended for by the defenders, that it contemplates the bringing down of the surface upon condition only of paying damage. Now, keeping in view that long-wall working was a thing then entirely

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(1) (1881) 9 R. 375, affirmed of Lord President Inglis is reported sub nom. *Dixon v. White* (1883) at p. 838, n. (2).  
8 App. Cas. 833. The judgment (2) [1910] A. C. 386.



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unknown, that the bringing down of the surface in that way was therefore a thing entirely unknown, and that the surface never was injured or brought down at all except by unskilful or negligent working in the ordinary mode by stoop and room, I think it would be very difficult indeed to give that meaning to the words.'” Then Lord Macnaghten goes on (1): “And then, after some further observations which I need not quote, his Lordship expressed his opinion that ‘nothing but a clear implication or express words’ could deprive the surface owner of his common law right of support, and he added that he was unable to find anything of the kind in the clause in question.” And Lord Macnaghten with regard to Lord President Inglis observes: “Among judges of modern times there is no higher authority than Lord President Inglis, and I may add that the line of reasoning which he adopted in *White v. Dixon* (2) seems to be in accordance with what was laid down in *Rowbotham v. Wilson* (3) by Lord Wensleydale.”

Again, in many cases relating to the rights of lords of a manor under Inclosure Acts words similar to those found in the deed now in question have been held insufficient to rebut the presumption in favour of the right of support which Lord Macnaghten refers to in the *Butterknowle Case*. (4) Lastly, it will not fail to be noted that the effect attributed by the defendants to the clause here will have as a result very disastrous consequences for the surface. So long as the minerals and the surface are in one hand the owner working the minerals may be trusted to preserve the surface, unless the profit to be derived by him from the working of the minerals is sufficient to compensate him for the necessary destruction of the surface; but where the two hereditaments are severed, and the mineral owner has only his mineral profit to safeguard, there is little interposed between the surface and destruction. It is true that it may be impossible as matter of construction so to limit in their operation such words as we find here in order that this change of circumstances may be redressed, but it may well be that the consequence of such an impossibility is not to leave the clause to its full literal operation; rather it may be strictly in accordance

(1) [1910] A. C. 387.

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(2) 9 R. 375; affirmed sub nom. *Dixon v. White*, 8 App. Cas.

(3) (1860) 8 H. L. C. 348, 363.

(4) [1906] A. C. 305.

with precedent and necessary also for the purpose of maintaining the presumption of support, to which the Courts have always so jealously given effect that, following the guidance of Lord Blackburn and Lord President Inglis, particularly in the case of an old deed like this, and notably in the case of one which contains no provision for compensation, it should be held that the working contemplated by the parties was only that known at the time of its execution, in other words, a mode of working from which no injury to the surface was to be apprehended.

I have said enough to show that the authorities apart from the recent case in the Court of Appeal of *Beard v. Moira Colliery Co.* (1), which I have already alluded to, and to which I must now turn in detail, show that the question here propounded on behalf of the plaintiffs might have been made the subject of strenuous and promising argument. But to all this and to much else the defendants through Mr. Clauson make in this Court a short answer. They say that here, if the construction which I have placed on the proviso and declaration be correct, their rights are concluded by the decision of the Court of Appeal in the case referred to, and accordingly I now proceed to deal with that case without staying further to examine the earlier authorities.

In the *Moira Case* (1) the instrument of severance was executed in the year 1829, and it is stated in the head-note that in that year "G. being seised in fee of certain estates conveyed a portion of them, consisting of farm lands and houses, to H. By the terms of the deed all the mines and minerals under the lands conveyed were excepted from the conveyance, full and free liberty being reserved to G., his heirs and assigns, to enter upon the lands, sink pits and shafts, and to exercise all other powers for working and getting the minerals 'in as full and ample a way and manner as if these presents had not been made and executed.' G. also covenanted to pay compensation for damage or injury done by digging and sinking pits and shafts or otherwise in exercise of the powers reserved to him. In an action by the plaintiffs, deriving title through H., for an injunction to restrain the defendants, claiming through G., from so working the minerals as to let down the surface:—Held, that having regard to the terms of the *reserv\**ation, which

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gave the grantor full liberty to work and get the minerals in as full and ample a way as before conveyance, the plaintiffs' common law right to support was by necessary implication displaced, and the defendants had a right to let down the surface." Now in that case G. was an ordinary purchaser of the surface from a vendor who was owner both of the surface and of the minerals under the surface. G. acquired the surface by a deed of purchase in 1829, and he paid for it a sum of no less than 13,122*l.*, the minerals by the deed being reserved to the vendors in the terms set forth in the head-note. In the present case the deed was, as I have said, a partition of the surface, the minerals being reserved by the co-owners to themselves in common. Again in the *Moirá Case* (1) there was a provision for partial compensation, that is, no compensation was given for letting down the surface, but it was given for other and lesser things. In the present case, as I have said, there is no provision for compensation at all. Now with regard to the first of these subjects it is as matter of construction probably easier, and it certainly is not more difficult, to imply in the mineral owners a right to let down the surface previously held in common for the purpose of working the minerals still held in common than it is to imply that right against a purchaser of the surface who never has had, and is not going to have, any interest in the minerals. In cases like the *Moirá Case* (1) the principle that a grantor must not derogate from his grant has a very obvious application; less so in cases like the present. So far, therefore, the case in the Court of Appeal is stronger, or is at least as strong, in favour of the surface owners as is the present case. I will deal with the second point, the clause of compensation, in a moment, after I have stated what happened in the *Moirá Case*. (1) That case first came before Eve J. He decided it in favour of the mineral owners on the ground that the evidence adduced before him satisfied him that the parties to the deed at the date of its execution had present to their minds the fact that it was impossible to work the minerals without letting down the surface, and accordingly he held that they had entered into the deed with that consequence in their minds, so that by necessary implication there was given to these mineral owners a right to let down the surface. When

(1) [1915] 1 Ch. 257.

the matter came before the Court of Appeal, however, as Mr. MacSwinney very kindly pointed out to me in the course of his argument, the Court of Appeal intimated that they were not satisfied that the evidence before Eve J. led to any such conclusion so far as the working of the deep levels was concerned ; in fact they held that so far as these levels were concerned there was no evidence that the parties to the deed could have contemplated or must have contemplated that the working of the deep levels would necessarily bring down the surface. Accordingly the Court of Appeal, when deciding as they did in favour of the mineral owners, must be taken to have done so upon the footing that quoad these deep levels there was no evidence that the parties knew or supposed that if they were worked subsidence must necessarily follow, and this clearly appears in a short passage in the judgment which states the whole basis of the decision. Swinfen Eady L.J., who gave the judgment of the Court, says this (1) : “ As Sir Roger Gresley ”—that is, G.—“ was owner in fee, if he had not made and executed the conveyance to William Harris,”—he was the purchaser—“ he would have had a perfect right to let down the surface while working the minerals, and unless after conveyance he retained that right he would not have been able to work, procure, and carry away ‘ in as full and ample a way and manner ’ as before conveyance. It was a necessary implication from the language used that he should have a right to let down the surface, if he was to be able to work, procure, and carry away the coal in as full and ample a way and manner as before conveyance. If A. has the right to work coal so as to let down the surface, and B. is to have the same right as A., it follows by necessary implication that B. is to have the right to work coal so as to let down the surface ; otherwise he would not have the same right as A.” In the course of the judgment also the case of *Chamber Colliery Co. v. Twyerould* (2) in the House of Lords was referred to at length by the Lord Justice. That was a case in which on a sale of minerals with a reservation of the surface, which of course is the strongest case in favour of implying a right to let down on the part of the mineral purchaser, Lord Watson, with the concurrence of Lord Herschell, Lord Macnaghten, Lord Morris, and Lord Hannen, expressed a doubt whether a provision certainly not

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(2) [1915] 1 Ch. 268, n.



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less extensive than that before the Court in the *Moir* Case (1) was of itself sufficient to imply a right to let down the surface. The Court of Appeal, however, following the statement in a later case by Lord Halsbury (2) that he would not himself have felt such a doubt, applied that view of Lord Halsbury's to the case then before it, namely, a case where the surface was granted and the minerals were reserved. Furthermore, the *Butterknowle* Case (3) was referred to at length in the judgment of the Court of Appeal, but the passage of Lord Macnaghten's judgment with regard to the effect of a clause of partial compensation was not alluded to as militating against the conclusion at which the Court arrived on the construction of the deed before it. Finally the cases arising under the Inclosure Acts were referred to as standing on a special ground, and they were dealt with in the following words: "These cases," Swinfen Eady L.J. said (4), "have laid down a rule for the interpretation of Inclosure Acts, and they have been explained as resting upon the change in the nature of the commoners' interest by the inclosure; but there is no ground for extending any principle which may be found in these cases to the construction of deeds, contrary to the rules for the construction of deeds which have been observed for centuries, and contrary to the definite opinion of Lord Halsbury in the *New Sharlston* Case (2), to which we have before referred."

The result appears to me to be that all the points which could in the present case be taken on behalf of the plaintiffs were, with one possible exception, open in the *Moir* Case (1), and that case was nevertheless decided against the surface owners by the Court of Appeal. That case was very fully argued and all the authorities were cited; many of them, as I have shown, were referred to in the judgment; and although the points in favour of the surface owner emerging from them were not expressly mentioned, I must take it that they were fully considered by the Court. Accordingly, except on one possible point to which I shall now refer, there is, having regard to the construction which I place upon the proviso and declaration in the present deed, no ground on which, as I think,

(1) [1915] 1 Ch. 257.

[1904] 2 Ch. 443, n., 446, n.

(2) In *New Sharlston Collieries*  
*Co. v. Earl of Westmorland* (1900)

(3) [1906] A. C. 305.

(4) [1915] 1 Ch. 268.

that case can in any way be said to be fairly distinguishable from the present case. But in that case, as I have said, there was a clause of partial compensation. The Court of Appeal attached no importance to it. In the present case there is no clause for compensation at all. With regard to that Lord Davey in the passage which I have read regarded such an omission as fatal to the claim of the mineral owner to let down the surface. Lord Macnaghten, however, regarded such an omission as of less importance than the insertion of a clause for partial compensation—a clause which the Court of Appeal completely disregarded in the *Moira Case*. (1) In these circumstances, even if I did not myself prefer, as I very respectfully venture to do, the opinion of Lord Macnaghten to that of Lord Davey on this point, I should nevertheless consider that that one distinction between the two cases was too trivial to justify me in saying that the decision of the Court of Appeal there does not bind me here. Being therefore of opinion, as I am, that the decision of the Court of Appeal in *Beard v. Moira Colliery Co.* (1) is in this Court conclusive in favour of the present defendants, I must declare on this point of law that the defendants are entitled to let down the surface. Accordingly I answer the question put to me in that sense.

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[Counsel agreeing that the decision on the point of law substantially disposed of the action, his Lordship, under Order xxv., r. 3, dismissed the action with costs.]

A. C.

The plaintiffs appealed. The appeal came on for hearing on January 31, 1917.

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*H. Terrell, K.C.*, and *MacSwinney*, for the appellants, repeated the arguments used by them in the Court below and submitted the following propositions:—1. An owner of minerals who claims the right to let down the surface where there has been a severance must show that either in express terms or by necessary implication he has been granted a licence to do so. 2. Words which are wide enough to import such a licence will not be so construed if effect can

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be given to them without including such a licence, unless the context and circumstances show an intention to grant it. 3. If it does not appear that at the date of the instrument the ordinary method of working involved the letting down of the surface, that is a strong circumstance against the implication of the right. 4. If there is in the instrument no provision for compensation, that is almost conclusive against the existence of the right.

[In addition to the cases cited in the Court below they referred to the following authorities:—*Love v. Bell* (1), *Harris v. Ryding* (2), *Rowbotham v. Wilson* (3), *Duke of Buccleugh v. Wakefield* (4), *Buchanan v. Andrew* (5), *Hext v. Gill* (6), *Mundy v. Duke of Rutland* (7), *Dixon v. White* (8), *New Sharlston Case* (9), *Martyn v. Knowllys* (10), and *Bell v. Earl of Dudley*. (11)]

*Clauson, K.C.*, and *J. G. Wood*, for the respondents, were not called upon.

*Cur. adv. vult.*

Feb. 9. WARRINGTON L.J. read the judgment of the Court (Lord Cozens-Hardy M.R., Warrington L.J., and Lawrence J.). The plaintiffs in this case are owners, as trustees, of a piece of land with a building thereon situate at Aberamman, Aberdare, in the county of Glamorgan. The defendants are the owners as to one undivided third and lessees as to the other two undivided third parts of the mines and minerals under the plaintiffs' piece of land and the adjoining lands. The defendants claim the right so to work their mines and minerals as to cause subsidence to the surface of the land, and it is alleged that they have already caused such subsidence. This action is brought for an injunction.

The case raises the common question as to the mutual rights of the owners of surface and the owners of minerals where they have been severed. The law is now well settled. It is thus stated by Lord Macnaghten in the case of *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Society*. (12) Lord Macnaghten

(1) (1884) 9 App. Cas. 286.

(2) (1839) 5 M. & W. 60.

(3) 8 H. L. C. 348.

(4) (1870) L. R. 4 H. L. 377.

(5) (1873) L. R. 2 H. L. Sc. 286.

(6) (1872) L. R. 7 Ch. 699.

(7) (1883) 23 Ch. D. 81.

(8) 8 App. Cas. 833.

(9) [1904] 2 Ch. 443, n.

(10) (1799) 8 T. R. 145.

(11) [1895] 1 Ch. 182.

(12) [1906] A. C. 305, 313.

there says : “ The result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication.” The question then is purely one of construction of the instrument, whether conveyance, lease, or Act of Parliament, by which the severance is effected.

The facts of the present case are as follows : Prior to the execution of the deed of February 23, 1788—the effect of which I will state presently—considerable estates in the counties of Glamorgan and Brecon with the minerals thereunder stood settled, in the events which had happened, to the use of Edward Mathew for life, with remainder to certain uses for securing a jointure to his wife Mary, with remainder to the use of the three daughters of Edward Mathew, Rebecca Curre, Maria Elinora Gwynne, and Eleanor Lord, as tenants in common in tail, with cross-remainders between them, with remainder to the use of Mary Mathew for life, with an ultimate remainder to the use of Edward Mathew in fee. By the deed of February 23, 1788, which was made between Edward Mathew and Mary his wife of the first part, John Curre and Rebecca his wife of the second part, Thynne Howe Gwynne and Maria Elinora his wife of the third part, Hugh Lord and Eleanor his wife of the fourth part, and certain grantees to uses and trustees of the fifth and sixth parts (afterwards perfected by the further assurance then required by law, in this case a fine), the surface of the lands was partitioned, one part being granted in severalty subject to the life interest of Edward Mathew to certain uses in favour of each of his said three daughters, their husbands and issue. The minerals were excepted from the partition thereby made. They are mentioned, or dealt with, in three passages in the deed : first, a recital “ And whereas the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife, with the consent and approbation of the said Edward Mathew and Mary his wife (testified by being parties thereto and sealing and executing of these presents), in order to avoid all disputes in future touching and

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concerning the division and partition of the aforesaid manors messuages mills lands and premises have severally and mutually agreed to make partition between them of the said premises in three equal parts or shares in such manner as is hereinafter mentioned reserving and excepting nevertheless out of such division and partition all such veins and seams of copper lead iron ore coal and all other mines and minerals whatsoever already opened or at any time hereafter to be opened or found in and upon all and singular the said premises or any part thereof which are to continue in common for the benefit or advantage of all and every such person and persons who are now before the sealing and delivery of these presents interested in and entitled thereto their heirs and assigns ” ; secondly, an exception from the granting part of the deed of “ the veins and seams of copper lead iron ore coal and other mines and minerals in and upon all and singular the said manors messuages and premises and every part thereof with full and free liberty at all times hereafter for the said Edward Mathew during his life and for the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, and Hugh Lord and Eleanor his wife his her and their heirs and assigns their agents servants workmen horses cattle and carriages to enter upon the said premises to work and convert the same to the most advantage for their mutual benefit always excepted and reserved out of this grant and conveyance ” ; thirdly, a proviso towards the end of the deed : “ provided always nevertheless and it is hereby declared and agreed by and between the said Edward Mathew John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife and every of them and their true intent and meaning respectively is that all and all manner of veins and seams of copper lead iron ore coal and all and every other mines and minerals whatsoever already opened and unopened or at any time hereafter to be opened and found in upon or under all or any of the aforesaid manors messuages lands tenements and premises or in upon or under any part or parcel thereof mentioned or comprised in the aforesaid marriage settlement of the 10th day of December, 1747, and divided and limited in three equal parts or shares after the decease of the said Edward Mathew in manner hereinbefore mentioned are hereby expressly reserved and excepted out of the afore-

said partition and division of the said manors messuages lands and premises for the benefit profit and advantage of the said Edward Mathew and his assigns for his life and after his decease for the joint profit benefit and advantage of the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife, Hugh Lord and Eleanor his wife and of all and every other person and persons his her and their heirs and assigns who were interested in and entitled to the said manors messuages lands and premises previous to the execution of these presents and"—which apparently ought to be read as if it were "with"—"full and free liberty for the said Edward Mathew and his assigns during his natural life and also for the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife and Hugh Lord and Eleanor his wife his her or their respective heirs and assigns (after the decease of the said Edward Mathew) his her and their agents servants workmen horses cattle carts and carriages whatsoever at all times and seasons hereafter to enter upon the said manors messuages lands and premises and every part and parcel thereof for the working carrying and converting of the said veins and seams of copper lead iron ore coal and other mines and minerals and every part thereof for the equal and joint benefit profit and advantage of the said John Curre and Rebecca his wife, Thynne Howe Gwynne and Maria Elinora his wife and Hugh Lord and Eleanor his wife their heirs and assigns and every person or persons whatsoever lawfully claiming under them respectively in as full and ample manner to all intents and purposes as if these presents and the partition and division of the said manors messuages lands and premises as aforesaid had not been done and made, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

The plaintiffs derive title to their piece of land under Hugh Lord and Eleanor his wife or those claiming under them. The defendants' title is derived from the three daughters and their husbands and persons claiming under them. It is clear that prior to the partition the persons from whom the defendants derived their title might between them, with the consent of Edward Mathew during his life, have worked the mines in any manner they pleased, whether they let down the surface or not, inasmuch as both surface and mines

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belonged to Edward Mathew and themselves in possession. It follows, in our opinion, that the defendants who derive title under them, Edward Mathew being, of course, long since dead, are entitled to work the mines in the same full and ample manner, and effect would not be given to the proviso contained in the deed unless it be held that they are so entitled. In our opinion, to use the words of Lord Macnaghten, the interference or disturbance complained of by the plaintiffs is authorized by the instrument of severance in express terms or by necessary implication, or, to apply Lord Loreburn's test, "the introduction of a clause that the mines must be worked so as not to let down the surface" would create "an inconsistency with the actual clauses of the instrument": see the *Butterknowle Case*. (1) The judgment of Younger J. in favour of the defendants is therefore correct and ought to be affirmed.

We have thought it right to express our opinion on the deed without reference to authority, but the case is, in our opinion, covered by the judgment of the Court of Appeal in the case of *Beard v. Moira Colliery Co.* (2) It is unnecessary to state the facts of that case; it is enough to say that they are, in our opinion, indistinguishable from those of the present case.

The appeal must be dismissed with costs.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare; Ullithorne, Currey & Co., for D. W. Jones, Merthyr Tydfil.*

(1) [1906] A. C. 305, 309.

(2) [1915] 1 Ch. 257.

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*Settlement—Power of Appointment amongst Children—Marriage of only Child—Separation Deed—Donee of Power Party to Deed for special Purpose—Effect of Recital—Power released by Implication.*

E. T. under her father's will had a power of appointment by deed or will over one twelfth of his residuary estate in favour of her children and remoter issue, such issue to be born in her lifetime. The value of the twelfth share was about 17,000*l.* L. T., the son and only child of E. T., married in 1889 and had two children, both born in E. T.'s lifetime.

In 1900, by a separation deed made between L. T. of the first part, his wife of the second part, E. T. of the third part, and trustees of the fourth part, after reciting an agreement between the parties of the first three parts that L. T. and his wife should enter into a separation deed, to which E. T. should be a party and should enter into such covenant by her as thereafter contained, and that L. T. should make such settlement as thereafter contained, and that he was entitled to one twelfth of the residuary estate of his grandfather, subject to E. T.'s life interest therein, the parties of the first, second, and fourth parts entered into mutual covenants providing for the husband and wife living apart, then E. T. separately covenanted to pay during her life to L. T. the sum of 300*l.* per annum, and then L. T., as settlor, assigned to the trustees the sum of 10,000*l.* to be raised out of the said share to which he was entitled in reversion as soon as it fell into possession, to be held on trusts (in the events which happened) for the benefit of his two children. In February, 1909, L. T. died, and by his will left his estate to charities. Subsequently E. T. by a deed poll appointed the twelfth share upon trusts for the benefit of L. T.'s two children and their respective issue to be born in her lifetime. E. T. died in 1915, and the question arose whether the separation deed had in any way affected her power of appointment:—

*Held*, that it was a question of intention to be inferred from the terms of the separation deed and the surrounding circumstances, and the true inference was that E. T. thereby wholly released her power of appointment, and therefore 10,000*l.* was subject to the trusts of that deed and the balance of 7000*l.* passed under L. T.'s will.

## ADJOURNED SUMMONS.

Samuel Sugden, who died in 1896, by his will, after appointing executors and trustees thereof, and after giving divers specific and



NEVILLE J. pecuniary legacies and annuities, devised and bequeathed considerable real and personal estate to his said trustees upon trust for sale and conversion (but with power nevertheless to postpone such sale and conversion), and out of the proceeds of such sale and conversion to pay all expenses and his debts and funeral and testamentary expenses and legacies and to provide as therein mentioned for the said annuities, and to stand possessed of the ultimate surplus of the said trust moneys in trust (in the events which happened) for his twelve children equally, and the testator directed his trustees to stand possessed of the share of his daughter Emily, the wife of Thomas Terry, upon trust to invest the same and to pay the income thereof to his said daughter during her life for her separate use without power of anticipation, and after her death to stand possessed of her share and the income thereof in trust for all or any one or more exclusively of the children and remoter issue of his said daughter (such remoter issue being born in her lifetime) in such proportions, for such interests, and generally in such manner as she, whether covert or sole, should by deed, with or without power of revocation, or by will or codicil appoint, and in default of appointment, and subject to any partial appointment, in trust for the child if only one or all the children if more than one of his said daughter who being a son or sons should attain the age of twenty-one years or, being a daughter or daughters, should attain that age or marry.

The value of the one twelfth share of Emily Terry in the residuary trust estate of the testator was about 17,000*l*.

Emily Terry had issue one child only, namely, Louis Thomas Terry. He married in January, 1889, and had issue two children only, namely, Noel Terry, born in January, 1890, and Kathleen Terry, born in November, 1895.

Noel Terry married in August, 1912, and had issue one child only, namely, Dorothy Terry, who was born in the lifetime of Emily Terry.

By an indenture made November 21, 1900, between Louis Thomas Terry of the first part, Margaret Nina Terry, the wife of Louis Thomas Terry of the second part, Emily Terry of the third part, and trustees of the fourth part, after reciting the marriage of Louis Thomas Terry and Margaret Nina Terry and the birth of their

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said two children, and that it had lately been agreed between the NEVILLE J. said parties thereto of the first, second, and third parts that a petition presented in the Divorce Division of the High Court of Justice by Margaret Nina Terry for a judicial separation from Louis Thomas Terry should be dismissed upon the terms and conditions (amongst others) thereafter mentioned, and that it was part of such terms that a proper deed of separation and arrangement should be executed between the parties, and that Emily Terry should be a party to the arrangement and by the deed of separation should enter into such covenant as was by her thereafter contained, and that Louis Thomas Terry should make such settlement as was thereafter contained, and reciting "whereas under the will of Samuel Sugden deceased dated the 21st of December, 1891, proved on the 30th of November, 1896, in the Principal Registry the said Louis Thomas Terry is entitled to one equal twelfth part or share or some other part or share of all and singular the trust property subject to the trusts of the said will subject to the life interest of the said Emily Terry therein," it was witnessed that in pursuance of the said agreement and for the considerations therein appearing the said parties thereto of the first, second, and fourth parts did thereby covenant with each other that the said Margaret Nina Terry should thereafter live separate and apart from the said Louis Thomas Terry, upon the terms and provisions thereafter set forth; then Emily Terry separately covenanted to pay during her life to Louis Thomas Terry, his executors or administrators, the clear annual sum of 300*l.*, to be paid quarterly; and then by the said indenture it was also witnessed that in further pursuance of the said agreement and in consideration of the premises the said Louis Thomas Terry, as settlor, did thereby assign unto the trustees "the sum of 10,000*l.* sterling to be raised out of the said part or share in the trust funds or the investments for the time being representing the same to which the said Louis Thomas Terry is entitled in reversion as aforesaid as soon as may be after the death of the said Emily Terry" to hold the same upon trust as to one moiety of the same trust premises to pay the income thereof to Margaret Nina Terry during her life or until she should remarry after the death of the said Louis Thomas Terry, and after the determination of the preceding limitation upon trust for Noel Terry and Kathleen

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NEVILLE J. Terry on their respectively attaining the age of twenty-one years, and as to the other moiety of the same trust premises in trust for Noel Terry and Kathleen Terry on their respectively attaining the age of twenty-one years.

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Louis Thomas Terry died in February, 1909, having made a will by which, after appointing the defendant Edgar Robins the executor and trustee thereof, he bequeathed all his property to certain charitable institutions. His wife subsequently married again.

Emily Terry by a deed poll dated March 18, 1909, after reciting her power of appointment in the will of Samuel Sugden and the death of Louis Thomas Terry leaving such issue as aforesaid, irrevocably appointed that the trustees of the said testator's will should stand possessed of the said twelfth part or share in the testator's residuary estate subject to her life interest, upon trust as to one moiety thereof for the defendant Noel Terry for his life, and after his death for such of his children born in the lifetime of Emily Terry as should attain the age of twenty-one years or marry, and in default of such issue upon trust for the defendant Noel Terry absolutely; and as to the other moiety thereof for the defendant Kathleen Terry for her life, and after her death for such of her children born in the lifetime of Emily Terry as should attain the age of twenty-one years or marry, and in default of such issue upon trust for the defendant Kathleen Terry absolutely.

On the death of Emily Terry in 1915 a question arose as to how far the separation deed operated as an execution or release of Emily Terry's power of appointment having regard to her deed poll, and the plaintiffs, who were the present trustees of the will of the testator Samuel Sugden, issued a summons to determine the matter.

*G. M. Hildyard*, for the plaintiffs.

*J. F. Carr*, for the defendant Dorothy Terry. The separation deed did not operate as an exercise or release of the power of appointment at all, and full effect must be given to the deed poll. The recital of Louis Terry's title to the twelfth share is an inaccurate statement of his interest and is inconsistent with the existence of the power. Emily Terry only joined for the purpose of her covenant

to pay an annuity to her son, and where a person joins as a party to a deed for a special purpose he cannot be considered as having joined for a totally different purpose: *In re Horsfall* (1); *Griffith-Boscawen v. Smith* (2); *Minchin v. Minchin* (3); Farwell on Powers, 3rd ed. pp. 222, 227. *Foakes v. Jackson* (4) may be cited against me, but there the donee of the power joined in an assignment of the property. Here there was no assignment by Emily Terry, and if the deed does not operate as a release of her power the trustees of the deed have their remedy for the 10,000*l.* against Louis Terry's estate. But if it does operate as a release it is only a partial release to the extent of the 10,000*l.* and leaves the balance of 7000*l.* untouched to pass by the deed poll: *In re Evered* (5); *Cuninghame v. Anstruther*. (6)

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*Jenkins, K.C.*, and *Metcalfe*, for the defendant Kathleen Terry. It is submitted that it is not a case of estoppel, but of intention. The recital was true so far as it went, but it was subject to defeasance by an exercise of the power. The case is very like *Lovett v. Lovett* (7), in which there was a similar recital, and it was held that the power was not released. Louis was not the only object of the power, and was not in a position to bargain, and Emily Terry may properly be held to have released 10,000*l.* to enable him to make a provision for his wife and children. But there is no hint of any bounty to Louis himself, and there is no necessity to press the recital beyond giving effect to the operative part of the deed. If the deed operates as a release of the whole twelfth share, it will give Louis something that was not within the purview of the deed. Emily Terry was only bound by her covenant, or at all events she was not bound to do more than to give effect to the operative part of the deed, i.e. to the extent of 10,000*l.*: *Foakes v. Jackson* (8); and the 7000*l.* was appointed by the deed poll.

*Stokes*, for the defendant Noel Terry, adopted the same line of argument, and referred to *In re Maddy's Estate*. (9)

*Sir D. Warmington*, for the trustees of the separation deed.

*F. K. Archer*, for the executor of Louis Terry. It is submitted

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|--------------------------------|------------------------------|
| (1) [1911] 2 Ch. 63.           | (6) (1872) L. R. 2 H. L. Sc. |
| (2) (1884) 26 Ch. D. 358, 362. | 223.                         |
| (3) (1871) Ir. R. 5 Eq. 258.   | (7) [1898] 1 Ch. 82.         |
| (4) [1900] 1 Ch. 807.          | (8) [1900] 1 Ch. 807.        |
| (5) [1910] 2 Ch. 147.          | (9) [1901] 2 Ch. 820.        |



NEVILLE J. that Emily Terry wholly released her power of appointment by the separation deed, and that 10,000*l.* is held on the trusts of that deed, and the balance of 7000*l.* passes under the will of Louis Terry.  
[He was stopped.]

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NEVILLE J. I think a certain amount of confusion has crept into the consideration of cases where a point has arisen, similar to the point now before me, and that is the distinction between the question of estoppel and the question of intention. The question of intention depends upon the proper inference to be drawn having regard to the terms of the document which has to be examined and the surrounding circumstances. The question of estoppel stands upon a totally different footing. It is a question of evidence, and depends upon a person having made such a representation, or having acted in such a way, as to induce a third person in reliance upon the representation or the conduct to alter his position. He never afterwards can be heard to say that the representation he made was untrue, or that the impression he produced by his conduct was a false impression; in other words, he cannot give evidence of the truth, because the truth is inconsistent with the representation or the conduct by which he induced a third party to alter his position. But the two things are totally distinct, and, with much respect, it appears to me that distinction has been lost sight of in some of the cases which have been cited.

In the present case I have to deal with a deed which is expressly declared to be a deed of arrangement between three parties—the mother, her son, and his wife. Between the latter certain divorce proceedings were pending, and this deed of separation was to put an end to those unpleasant proceedings. The son, as matters stood, was entitled in reversion to a settled fund to which his mother was entitled for life and over which she had a power of appointment, and in default of appointment the whole of the fund would go to him. The provision for the wife under the separation deed was to be as follows: [His Lordship stated briefly the provision for the wife, and continued:] Now the deed itself recites, firstly, that it is an agreement between the three; and, secondly, that the son was “entitled to one equal twelfth part or share, or some other part or share.” In passing I may say that is only a usual form

of expression and was not intended to deal with anything but NEVILLE J. what is called a twelfth share, the words "some other part or share" being added in case it should prove that there was a mistake with regard to the actual proportion of the fund to which the son was entitled—"of all and singular the trust properties subject to the trusts of the said will subject to the life interest of the said Emily Terry therein." That is a perfectly plain statement, and it is a perfectly true statement, of matters as they stood at the time when the deed was executed. One of the parties to the deed might, by the exercise of the power of appointment, alter the condition of things so that the son was no longer entitled to the one twelfth as recited, but unless she did that the interest of the son would remain what it is declared to be, an interest in the whole twelfth part of the share under the will of the grandfather. Then in the operative part of the deed the same thing is repeated. The son assigns to the trustees "the sum of 10,000*l.* to be raised out of the part or share of the trust funds or the investments for the time being representing the same, to which the said Louis Thomas Terry is entitled in reversion as aforesaid, as soon as may be after the death of the said Emily Terry"; and then interest is provided for. Now that of course is merely, in slightly different terms, a repetition of the statement to which I have already referred.

To my mind the real question to be determined here is, what was the intention of the mother, expressed by the deed to which she was a party and which she executed, with regard to the power of appointment which she had over the fund which by this deed is twice declared to be, subject to her life interest, the property of her son? First of all, it is said that there was no release of the power of appointment at all, and that the mother remained unfettered to appoint the fund amongst her issue as she pleased, passing over, if she so desired, her son, who by this deed is represented to be entitled to the whole one twelfth share. For that proposition the decision of Parker J. in *In re Horsfall* (1) is relied upon, in which he says—and I respectfully agree with him—that the mere fact that a person is a party to a deed for a particular purpose does not operate as an estoppel against that person nor make him responsible

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(1) [1911] 2 Ch. 63, 69, 70.

NEVILLE J. for all the other portions of the deed in respect of which he takes  
1917 no part and has no concern. Here the mother was a party not  
SUGDEN'S only to the deed but to the whole arrangement, and that arrange-  
TRUSTS, ment went forward upon the faith that the son was entitled to the  
*In re.* whole one twelfth share. It is not a question of authority. This  
SUGDEN is a transaction which is unlike in many particulars any of the  
v. transactions to which I have been referred. All that I have to do is  
WALKER. to apply the general rules of law and construction to the case before  
me. I have no reason to suppose that the mother had any dishonest  
intention in executing this deed, or that she intended to produce a  
false impression upon the minds of those with whom she was dealing,  
and it seems obvious that, unless such an intention existed in her  
mind, she at all events to the extent of 10,000*l.* must have intended  
to maintain the truth of the representations that she and the rest of  
them had made that the son was entitled to the one twelfth share. I  
come, therefore, not on the ground of estoppel, but giving credit to  
the parties to the deed for honest intentions, to the conclusion that  
she did intend to give up her right to interfere with the title of  
the son to the one twelfth share, at all events to an extent sufficient  
to enable 10,000*l.* to be raised. But when once you have got that  
as her intention—and I think that intention is pretty plain—it  
seems to me that you cannot stop there, because it is not a question  
of estoppel, but of intention, and, as she intended to release her  
power of appointment to some extent, how can you possibly limit  
it to the 10,000*l.* when the recital is, not that he is or will be entitled  
to so much of the one twelfth share as shall enable 10,000*l.* to be  
raised, but that he is entitled to the whole twelfth share? Treating  
it, as I do, as a question of intention to be inferred from the deed,  
how can I say that the release which was intended up to 10,000*l.*  
was intended to stop there? It seems to me that the inference is  
quite clear that when she was a party to this recital and to the  
statement in the operative part of the deed she was intending to  
release her power and to allow things to remain, as she declared  
them to be, for the purpose of inducing the other parties to execute  
the deed of separation, which they did. There is absolutely no  
ground for supposing that they all of them were not perfectly well  
aware how matters really stood. There is no ground for suggesting  
that she did not know that she had a power of appointment and,

if she knew she had a power of appointment, then when she says NEVILLE J. her son is entitled to the whole of one twelfth it must be upon 1917 the footing, which was true, that she had not exercised her power of appointment; and, inasmuch as to a certain extent she was SUGDEN'S TRUSTS, In re. SUGDEN v. WALKER. clearly intending to release her power of appointment, I cannot conceive why one should stop there and say, "Oh, yes, up to 10,000*l.*, but not beyond." If it were a question of estoppel there might be—I do not say there would be—a difference between 10,000*l.* and the rest of the fund. In my opinion it is not a question of estoppel at all but of the intention of the parties, and I hold that it was the intention of this lady to release wholly her power of appointment in respect of the twelfth share.

Solicitors: *Wilson & Son; Tatham, Oblein & Nash; Trower, Still & Co.; Walker & Battiscombe; Routh, Stacey & Castle; Edgar Robins & Grimsdall.*

H. L. F.

SELIGMAN *v.* EAGLE INSURANCE COMPANY.

NEVILLE J.

[1916 S. 98.]

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Feb. 5, 6.

*Insurance—Pre-War Contract—Mortgage of Life Policies—Surety—Outbreak of War—Assured an Alien Enemy—Whether Policies avoided—Subsequent Payment of Premiums by Surety—Illegal Intercourse—Surety's Right to Transfer of Securities—Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2—Trading with the Enemy Proclamation, September 9, 1914, s. 5, sub-ss. 1, 5, 6—Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 2; s. 6, sub-s. 1; s. 10.*

B., an alien, effected two policies on his own life with an insurance company and assigned them to the company by way of mortgage to secure a loan, and he and his sureties jointly and severally covenanted with the company to repay the loan with interest and also to pay the annual premiums for keeping the policies on foot. On the outbreak of war in August, 1914, B. became an alien enemy and left the country. Afterwards one of the sureties paid to the company the premiums as they accrued due from time to time, which the company accepted with the reservation that they did not warrant the validity of the policies. Subsequently the surety tendered the amount due on the mortgage and claimed an



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assignment of the policies which the company refused to execute without a similar reservation :—

*Held*, that the policies were not voided merely by B. becoming an alien enemy, that the payment to and receipt by the company of the premiums from the surety did not involve illegal intercourse with an enemy, and that the surety on payment of what was due under the mortgage was entitled to an assignment of the policies without reservation.

#### WITNESS ACTION.

By an indenture of mortgage dated October 12, 1910, and made between Baron W. von Liebermann, called the borrower, of the first part, the plaintiff and another person, called the sureties, of the second part, and the defendant company of the third part, it was witnessed that, in consideration of the sum of 2500*l.* paid by the company to the borrower at the request of the sureties, the borrower and sureties jointly and severally covenanted with the company to pay the company the sum of 2500*l.* with interest by the instalments and in manner therein mentioned. And it was thereby also witnessed that for the consideration aforesaid the borrower, as beneficial owner, thereby assigned to the company two policies of assurance on his own life effected with the company and all moneys assured by and to become payable thereunder subject to the usual proviso for redemption. And the borrower and the sureties respectively jointly and severally covenanted with the company to pay the premiums and all moneys payable for keeping up the policies thereby assigned. The deed also provided that as between each of the sureties and the company such surety was to be considered as a principal debtor for all moneys thereby assured so that the surety or his estate should not be released or exonerated by time being given to the borrower.

The two policies were dated respectively May 9, 1907, and October 12, 1910, for the sums of 2000*l.* and 1000*l.* respectively payable on the death of the borrower, at the respective annual premiums of 63*l.* 3*s.* 4*d.* and 34*l.* 2*s.* 9*d.*

All instalments and interest due under the mortgage and the premiums on the policies were paid down to the outbreak of the war in August, 1914, when the borrower, who was a German subject, went to Germany and had not since been heard of.

The plaintiff, as surety, paid the company the instalment and

interest under the mortgage that became due October 5, 1914, NEVILLE J. and the interest due on October 5, 1915, and paid the company the annual premiums on the policies which accrued on October 5, 1914, May 9, 1915, and October 5, 1915, and the company indorsed on their receipts for the premiums the following qualification: "In view of the present war the premium can only be accepted without prejudice to the effect of the war upon this policy, and such acceptance implies no assurance by the company as to the existing or continuing validity of the policy, nor any contract or understanding between the assured and the company based upon such acceptance," which the plaintiff accepted under protest.

In September 1915, the company called upon the plaintiff to pay the moneys due under the mortgage, which he was prepared to do on having a transfer of all the securities, and his solicitors forwarded the draft transfer to the company for approval. The company inserted in the draft the following qualification: "Provided always that nothing hereinbefore contained shall be construed as a guarantee or warranty on the part of the company of the subsistence or validity of the said policies or either of them or as estopping the company from at any time hereafter setting up or asserting any rights it may have to repudiate its liability under the said policies or either of them either conditionally or unconditionally or to resist or oppose in such manner and to such extent as it may be advised any claim which may hereafter be made in relation to the said policies or either of them or to refuse to accept any premiums or other payment which may hereafter be or have been tendered in respect thereof with or without qualification as if these presents had not been executed," and refused to execute a transfer without such qualification. Thereupon the plaintiff, after tendering the amount due which was not accepted, issued a writ against the company claiming a declaration that as between himself and the company the two policies were valid and subsisting policies, and that upon payment of what was due under the mortgage he was entitled to an assignment of the policies without qualification.

The company by their statement of defence admitted that they refused to execute an assignment of the policies without the qualification claimed by them, and submitted that such claim was proper and that it was their duty in the circumstances of the case to refuse

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NEVILLE J. to admit that the said policies were still valid and subsisting policies unless and until it was decided by the Court whether such policies were valid or subsisting, and, if so, to what extent or subject to what qualifications, and whether the plaintiff had any or what claim to the benefit thereof (if any) and the nature and extent of the liability (if any) of the company in respect thereof; and they alleged that they were and always had been willing to execute an assignment of the policies (if and so far as still valid and subsisting) provided that proper words were inserted therein for securing that they made no admission as to the validity or subsistence of the policies or either of them, or as to their right to refuse to accept further premiums in respect thereof.

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It appeared from the correspondence during 1915 between the plaintiff and the company and their respective solicitors that on the outbreak of the war insurance companies in general had been advised that policies on the lives of enemies had been dissolved by the outbreak of war, and also that under the Royal Proclamation premiums could not be received; but that the defendants, having regard to subsequent letters received from the Treasury, were in a position to accept premiums subject to the receipt being indorsed with the qualification in question.

*Ward Coldridge, K.C.*, and *Givven*, for the plaintiff. The nature of a policy of life insurance is defined in *Fryer v. Morland* (1), *In re Anchor Assurance Co.* (2), and *In re Harrison & Ingram*. (3) It is a contract for money made once for all, and is the purchase of a reversionary sum in consideration of the payment of an annuity or premium during the life of the person assured, and if the premium is not paid in any year the contract is at an end. It is also a chose in action, like the shares and debentures of a company, and does not, under the doctrine forbidding all commercial intercourse with an enemy subject, cease to exist on the outbreak of war although the rights of the enemy subject may be suspended during the war: *Westlake's International Law*, 2nd ed. part ii. p. 53, and cases there cited. This was a pre-war contract, and at the outbreak of war there was a subsisting right to the surrender value of the

(1) (1876) 3 Ch. D. 675, 685. (2) (1870) L. R. 5 Ch. 632, 638.  
(3) [1900] 2 Q. B. 710, 717.

policies and an equity of redemption under the mortgage, the legal estate being in the company, and it is submitted that the rights of the Baron are suspended and not destroyed. But if the company's right is to treat the policies as void, it would be for their own benefit and would be grotesque in its injustice to the plaintiff. If the Baron were to die during the war, his representatives could not obtain payment of the policy moneys, and the company would pay the Public Trustee, who would be a trustee for the plaintiff. An alien enemy may be sued in the High Court by a British subject on a contract made before the war although his rights under the contract are suspended during the war: *Porter v. Freudenberg*. (1) Here the Baron could have been sued on his covenant in the mortgage to pay the premiums on the policies if he could have been served with the writ, and the mere payment of the premiums by him would not necessarily have involved illegal intercourse: *Halsey v. Lowenfeld*. (2) Therefore there is nothing illegal in the plaintiff paying the premiums to the company for his own benefit, and the mere fact that his paying them may preserve the equity of redemption for the Baron does not destroy his rights: *Schmidt v. Van der Veen*. (3) We rely on the proviso in the Trading with the Enemy Proclamation of September 9, 1914. The case of *Solicitors' and General Life Assurance Society v. Lamb* (4) illustrates the distinction between the rights of a policy-holder who avoids a policy by his own act and the rights of a mortgagee for valuable consideration. It is submitted that the plaintiff is entitled to the relief for which he asks.

*Jenkins, K.C.*, and *C. W. Turner*, for the defendants. This was a contract which on the outbreak of war became illegal, and was dissolved because its continued existence would involve commercial intercourse with an enemy, which is prohibited by the common law, and the Proclamation of September 9, 1914, does not make anything legal which is illegal at common law: *Robson v. Premier Oil and Pipe Line Co.* (5); *Zinc Corporation v. Hirsch* (6); *Hugh Stevenson & Sons v. Aktien-Gesellschaft für Cartonnagen-Industrie*. (7) Admitting that the policies are not avoided by any of

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(1) [1915] 1 K. B. 857, 880.

(4) (1864) 2 D. J. & S. 251.

(2) [1916] 2 K. B. 707, 717.

(5) [1915] 2 Ch. 124.

(3) (1915) 31 Times L. R. 214.

(6) [1916] 1 K. B. 541.

(7) [1916] 1 K. B. 763.



NEVILLE J. the provisions contained in them, the office could not accept any premiums that fell due after the outbreak of war, because it would have involved illegal intercourse with an enemy. The observations of Warrington L.J. on this point in *Halsey v. Lowenfeld* (1) are in our favour. It is settled law that a marine policy is avoided on the outbreak of war, and it is submitted that a policy of life assurance is on the same footing. Further, the payments by the surety were on behalf of or for the benefit of an enemy and were within the mischief of s. 1, sub-s. 2, of Trading with the Enemy Act, 1914, and the Proclamation of September 9, 1914, s. 5, sub-ss. 5, 6, 7, and ss. 2, 6, sub-s. 1, and s. 10 of Trading with the Enemy Amendment Act, 1914.

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NEVILLE J. In this case the defendant company lent a sum of money to a person who is now an alien enemy. The loan was made some time before the war. It was part of the terms of the loan that the borrower had to insure his life with the defendant company in a certain sum on two policies of assurance. The terms of the policies differ in only one respect from the usual terms to be found in ordinary life policies, and that is that there is a covenant in them on the part of the assured, the borrower, to pay the premiums on his life policy from year to year, so that he could not, as is possible in the ordinary case, simply cease to pay his premiums and let the policy drop. If he did so, he was liable to be sued by the insurance company for all the future payments to be made during his life; but I do not think that really affects the question I have to determine. Part of the arrangement for the loan was that two sureties should be found, and they were found. So that the insurance company not only had the security of the policies on the borrower's life, but they also had the liability of two sureties for the amount due. The present plaintiff is one of those sureties. After the war broke out the plaintiff tendered the premiums which fell due on the policies, which were only accepted by the insurance company with a reservation as to whether the contract, at all events between them and the alien enemy, was not at an end. Subsequently the plaintiff tendered the whole of the amount due on the loan and demanded at the same time delivery of the securities which

(1) [1916] 2 K. B. 707, 716.

the insurance company held for the debt, asserting in that regard the ordinary rights of a surety when he discharges the debt of his principal. There again the insurance company refused to assign the policies except under a reservation, that is, a reservation of the question of whether the policies were good at all having regard to the outbreak of war and the fact that they were on the life of an alien enemy.

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It seems to me that the question lies within an exceedingly small compass. From my point of view there is nothing in the nature of the contract to put an end to it upon the outbreak of war. It seems to me that the insurance company could have sued the assured under his contract for the amount of the premiums under the covenant contained in the policy ; but that of course depends upon whether if they had sued and recovered the money it would have involved any act on their part which would come within the definition of "unlawful intercourse with the enemy" to put it in the words of Warrington L.J. in the case of *Halsey v. Lowenfeld* (1) : "If an act for its performance necessitates the concurrence of the other party, the promisee, and that involves unlawful intercourse with the alien, the latter would be discharged from his obligation." Bringing an action certainly involves the concurrence of the promisee, and I think no less the receipt of money tendered involves intercourse with the other party, and the question is whether that is lawful or unlawful intercourse. I have no doubt, and the Proclamation itself indicates the fact, that by law the receipt of money from an enemy in itself involves no unlawful intercourse. I take it that if every alien enemy of the British Empire at the present time were to make an offer of all he possessed to various individuals residing within the limits of the British Empire there would be nothing illegal in British subjects accepting it unless there was reason to suspect bribery. It is not the payment and the concurrence involved in accepting the payment that can possibly be unlawful intercourse.

The question here is this : A contract existed at the date of the outbreak of war that if the assured paid his premiums punctually during the whole of his life, then upon his death the company would pay a lump sum to his executors. It may be that by refusing to

(1) [1916] 2 K. B. 707, 716.

NEVILLE J. accept payment of the premium on the part of the policy-holder

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he would have been unable ever to recover against the company the lump sum contracted for, because it was a conditional contract, the contract being that payment should be punctually made. Now does the result of that intercourse, so to speak, involve anything illegal? The right of the policy-holder is clearly suspended during the war, and were he to die to-morrow his executors could recover nothing from the company; but whenever peace is restored between the countries normal relations in this regard will be resumed, and, although the right of the policy-holder is undoubtedly suspended, if the policy itself is not made void either at the time when war was declared or at the time when the current year of the policy ran out, I can see nothing illegal in the acceptance of the premiums by the company because no benefit can accrue to the enemy alien at all as the result of the payment of his premium; but what will result is that perhaps some day somebody who is not an enemy alien may have a right to sue the company for the amount assured. It seems to me this is one of those cases where the right is suspended.

I also think it cannot possibly be said here that mere receipt of the premiums by the company is unlawful intercourse with the enemy, and that really is the whole question. The payment itself cannot be illegal. Then, having regard to the result of the payment, can it be illegal? I say "no," because as regards the enemy alien himself he gains nothing by the transaction while he is an enemy alien. I come, therefore, to the conclusion that the company were bound to hand over the securities without reservation to the surety upon payment of the debt, and that the limitations they propose to insert in the assignment are not justified. There will be a declaration that the policies did not become void only by reason of Baron von Liebermann becoming an alien enemy, that the payment and receipt of premiums are not unlawful intercourse with an alien enemy, and that on payment of the amount due under the mortgage the plaintiff will be entitled to an assignment of the policies without reservation in accordance with the terms of the proviso for redemption.

*Jenkins, K.C.* I do not want a declaration that they are valid and subsisting policies.

NEVILLE J. I do not propose to make it. I have said simply NEVILLE J.  
that the company are to transfer the policies without reservation. 1917  
The surety takes the security for what it is worth.

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Solicitors : *Cohen & Cohen ; Hammond & Richards.*

H. L. F.

FOWLER v. MIDLAND ELECTRIC CORPORATION FOR  
POWER DISTRIBUTION, LIMITED.

EVE J.

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[1916 F. 635.]

Feb. 1, 26.

*Company—Debentures—Payment off—No Place fixed for Payment—  
Death of Debenture-holder—Executor—Delay in Registration of  
Probate—No Legal Tender—Interest until Date of Payment—Liability  
of Company.*

Where the registered debenture of a company does not contain any provision appointing a particular place for payment, it is the duty of the company to seek the debenture-holder, if he is within the realm, and make legal tender of the money on the due date without request ; and in a case where no such legal tender has been made the holder of such a debenture, who from oversight, carelessness, or other cause has neglected to present his debenture for payment off on the due date, can recover from the company interest on the principal moneys secured by the debenture down to the date of actual payment.

#### ACTION WITH WITNESSES.

The plaintiff, George William Fowler, as executor of Mary Jane Fowler, claimed 1800*l.* for principal and 45*l.* for premium due on eighteen debentures for 100*l.* each dated September 24, 1903, and issued by the defendant company to Mary Jane Fowler ; and, in addition, interest on such 1800*l.* at the rate of 4½ per cent. per annum from June 30, 1913. The principal moneys secured by the debentures together with a premium of 2½ per cent. were repayable on June 30, 1913, and interest was payable half-yearly on June 30 and December 31. By the first condition indorsed upon the debentures the holders were entitled to the benefit of a trust deed by which certain properties were charged in favour of the trustees to secure the debenture debt and interest. By condition (8.) it was



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provided that the company should recognize and treat the registered holder of every debenture as being sole absolute owner thereof, and as alone entitled to receive and give effectual discharges for the principal moneys or interest expressed to be thereby secured, and the company should not be affected by notice of any title or claim of any person to any debenture other than the registered holder thereof. (11.) In the event of the death of the registered holder of any debenture his executors or administrators should be the only persons recognized by the company as having any title to such debenture. (12.) Any person entitled to any debenture on the death of a holder might be registered as the holder upon evidence being produced. (16.) Notices to the debenture-holder should be deemed duly given if sent through the post prepaid addressed to the debenture-holder at his registered address, and notice so sent should be deemed to be served at the expiration of twenty-four hours after it was posted.

These debentures formed part of a series of trust mortgage debentures for securing 250,000*l.*, and the trust deed of July 29, 1903, subject to which they were issued, contained a provision that upon payment by the trustees to the debenture-holders of any moneys thereby secured the respective debentures should be produced to the trustees, who should cause a memorandum of the amounts and dates of payment to be indorsed thereon. These debentures did not contain any provision appointing a particular place for payment.

The defendant company made arrangements to issue on or about June 30, 1913, 400,000*l.* 5 per cent. guaranteed first mortgage debenture stock, partly to take the place of the first issue which then matured due, and partly to raise fresh capital. For this purpose it was necessary to pay off or discharge the prior debentures. On May 23, 1913, the defendant company sent through the post, prepaid, a circular letter to Mary Jane Fowler offering to issue such amount of the new debenture stock as she elected to take in exchange for her debentures. Having received no reply, a further letter dated June 23, 1913, was sent to her saying that it was assumed that she wished the debentures to be redeemed on June 30, and asking her to forward her debentures duly cancelled, and in exchange a cheque for 1845*l.* would be sent to her.

No reply was received. Mary Jane Fowler had died on January 19, 1913, and no notice of her death reached the defendant company until July 1 following, when the warrant for the half-year's interest payable on June 30 was returned to the company by her bankers with the information that she was dead, and that a Mr. Challiner, whose address was given, was one of her executors.

In July the company paid to the trustees of the debenture trust deed 1845*l.*, being 1800*l.* the principal money secured by Miss Fowler's debentures and 45*l.* the premium of 2½ per cent. thereon, and obtained a reconveyance and release from the trustees, and on August 15, 1913, addressed a letter to Miss Fowler at her registered address informing her of this payment, and that her debenture should be sent to Parr's Bank, who were acting for the trustees in the matter.

On October 22 the company wrote to Mr. Challiner informing him that they had the uncashed interest warrant for 38*l.* 2*s.* 9*d.* returned by the bank, and had been holding the same in anticipation of receiving probate for registration. To this Mr. Challiner replied at once stating that he had renounced, and that the plaintiff, whose address he gave, was "the only executor," adding, "I understand the probate is not likely to be taken out just at present, but if you will write to Mr. Fowler he will no doubt be able to advise you more fully." The company thereupon wrote to the plaintiff, and on October 25 he replied that he fully expected probate would be obtained within the next three weeks as the caveats which had been entered against probate had then been withdrawn.

Probate was granted to the plaintiff on November 5, 1913, but owing to his having put the bonds away with his own securities with the Chancery Lane Safe Deposit Company and forgotten all about them, it was not registered with the defendant company until April 10, 1916.

The defendant company paid to the plaintiff the interest on the debentures for the half-year ending June 30, 1913, and paid into Court the 1845*l.* and a sum of 159*l.* 10*s.* 9*d.*, being the interest earned on the 1845*l.* since it was paid to the trustees of the debenture trust deed; but the company repudiated any liability to pay to the plaintiff the difference between this sum of 159*l.* 10*s.* 9*d.* and interest at 4½ per cent., less tax, on the 1800*l.* from June 30, 1913.

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This action was brought by the plaintiff to recover the amount of that difference.

*Clayton, K.C., and F. L. Wright*, for the plaintiff. The only question now at issue is the amount of interest payable on the debenture. Our contention is that, there being no place stated in the debenture for payment, it was the duty of the debtor to find his creditor, if within the realm, and make a legal tender of what was due: *Thorn v. City Rice Mills*. (1) In that case there was a time and place fixed for payment, and North J. referred to the statement of the law in Leake on Contracts, revised in 6th ed. p. 623. In the present case no legal tender was made to Miss Fowler or her executor, and the plaintiff is entitled to interest at  $4\frac{1}{2}$  per cent. down to the time of payment.

*Maugham, K.C., and R. W. Baxter*, for the defendants. The plaintiff is not entitled to the additional interest claimed. The debenture is in common form, and it is not unusual to have no place fixed for payment. It cannot be the duty of the company to send round to find debenture-holders in order to make them a legal tender of their money. It would be impossible to work out as a matter of business. What was done was the common practice. Our contention is that the common law rule of legal tender is abrogated by implication from the conditions. The company only looks to the register and is not bound to look beyond it. Notice was sent to the registered owners that the company intended to pay off the debentures. It is a mere case of debtor and creditor. The notice given by the letter of May 23, 1913, was effectual, and must be deemed to have reached the debenture-holder or her executor, according to condition (16.): *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*. (2) In fact there was equitable tender by the letter of June 23, 1913, and less than legal tender is sufficient. A commercial tender is enough: *Webb v. Crosse*. (3) It was owing to the default and forgetfulness of the executor of the debenture-holder in leaving the debentures for more than two years with the Safe Deposit Company that this question has arisen. There is no equity for saying that any further

(1) (1889) 40 Ch. D. 357.

(2) [1894] 1 Q. B. 622.

(3) [1912] 1 Ch. 323.

interest than the 159*l.* 10*s.* 9*d.* is payable. Interest will not be allowed on a debt the payment of which has been delayed by the mortgagee's conduct: Coote on Mortgages, 8th ed. p. 1188; *Thornton v. Court*. (1)

*Clayton, K.C.*, in reply. There is no such thing as commercial or equitable tender. It is a question of legal tender only. *Thornton v. Court* (1) was decided upon an entirely different footing, and does not affect the question here. I submit there is no defence to this action.

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Feb. 26. EVE J. The short point raised by this action is whether the holder of a registered debenture not containing any provision appointing a particular place for payment, who, from oversight, carelessness, or other cause, has neglected to present his debenture for payment off on the due date, can, in a case where there has been no legal tender, recover from the borrowers interest on the principal moneys secured by the debenture down to the date of actual payment.

In other words, is it the duty of the borrowers in such circumstances to seek the creditor if he is within the realm, and to pay the money without request?

The particular debentures in this case were issued in 1903, and the defendant company thereby covenanted to pay to the person therein named, or other the registered holder for the time being, the principal sum therein mentioned, together with a premium of  $2\frac{1}{2}$  per cent. on June 30, 1913, and, until payment of such principal moneys, to pay interest at the rate of  $4\frac{1}{2}$  per cent. per annum on the said principal sum half-yearly on June 30 and December 31.

The debentures do not themselves contain any charge on the company's assets, but by one of the conditions indorsed thereon it is provided that the holders of the debentures are and will be entitled *pari passu* to the benefit of an indenture therein mentioned whereby certain freehold and leasehold properties belonging to the company had been assured or covenanted to be assured to, and the other assets of the undertaking of the company had been charged in favour of, trustees to secure the debenture debt and



EVE J. interest. [His Lordship stated the rest of the material facts, and  
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It is not disputed that the general rule that the debtor must seek his creditor might, and probably would have applied had the registered holder, Miss Fowler, survived June 30, 1913, but it is suggested that the real bargain being a covenant to pay Miss Fowler, or other the registered holder, with express terms that the company should recognize and treat the registered holder of each debenture as being sole absolute owner thereof, and as alone entitled to receive and give effectual discharges for the principal moneys and interest, and that on the death of a registered holder his administrator or executor should be the only person, recognized by the company as having any title to the debenture and might be registered as the holder thereof, the company was not bound to look beyond the register, and that when it was discovered that the person whose name appeared on the register as the holder was dead, the company was relieved from any obligation to seek out the administrator or executor and could retain the overdue principal moneys, or deposit them with the trustees, without being liable to pay interest on them until such time as the legal personal representative chose, or was able to have the grant to him recorded in the register.

I do not think this suggestion is well founded. The contract is in express terms to pay interest until payment of the principal moneys, and the conditions relating to the register and to the absolute title of the registered holder and his legal personal representatives are not intended to operate, nor do they in fact operate, as a qualification on the covenant to pay. They are inserted to protect the company and the debenture trustees against the possible consequences of notice of any trust in favour of, or any claim advanced by, a third party, and to relieve the company and the trustees of all obligation to pay regard to any persons other than those in whom the legal title is vested. Beyond this they do not, in my opinion, affect the rights of the debenture-holder and his legal personal representatives, and I cannot so construe them as to hold that they transfer to the creditor the obligation of seeking out the debtor.

But then it is said that, if this conclusion be right, a careless

debenture-holder, or one who was more content to leave his money with the company, possibly at a high rate of interest, than to have it repaid, might inflict hardship on the company by neglecting to surrender his debenture, or, possibly, by delaying the application for a grant of administration to the estate of a holder who had died intestate. This may be so, but in the first place the whole difficulty can be, and I think at the present time generally is, met by a condition fixing a place for payment, and in the next place, even in the absence of such a condition, a legal tender to the careless debenture-holder could determine his right to subsequent interest, and by payment into Court in redemption or administration proceedings the same result could probably be brought about in the case of a deceased member.

But these latter considerations do not really apply to the present case, for, as I have already shown, the company was supplied, on the day after the debenture matured for payment, with the name of one of the deceased holder's executors, and by the 24th of the following October the information was given that the plaintiff was the only proving executor, and was expecting to receive the grant within a few weeks. The defendants were therefore, from the first, in possession of information which told them the person or persons to whom a tender might be made, and although it is true that caveats had been entered, and this might have made them hesitate for a time to make such tender, all grounds for any such hesitation were removed by the letter addressed to them in October.

I think the defendants have taken a mistaken view of their true position, and that there is no defence to the action. There will be judgment for the plaintiff for the amount of the difference between the 159*l.* 10*s.* 9*d.* and the interest on the 1800*l.* at 4½ per cent. per annum from June 30, 1913, down to judgment, less tax, and an order for payment out to him of the moneys in Court. The defendants must pay the costs.

Solicitors for plaintiff: *Ranger, Burton & Frost, for George Trenam, Balham.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

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[1915 P. 1589.]

• Jan. 19, 23.

*Public Health—Street—Expenses of Making up—Apportionment among Property Owners—Failure of Owner to make Objections—Reliance on Exemption previously bargained for—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), ss. 6, 7 (e), (f), 8, sub-s. (2).*

Where an urban authority has adopted the Private Street Works Act, 1892, and has duly published the resolution required by s. 6 of that Act with reference to the making up of a new street, an objection by an owner of property fronting on the street (who is shown in a provisional apportionment as liable to be charged with an apportioned amount of the expenses of the making up), on the ground that by agreement with the urban authority he has been exempted from liability in respect of his property, is, if not an objection that the property "ought to be excluded from . . . the provisional apportionment" within the meaning of head (e) of s. 7 of the Act, at any rate an objection "that the provisional apportionment is incorrect in respect of some matter of fact," within the meaning of head (f) of s. 7, which must be taken by written notice to the urban authority within one month after the publication of the resolution; and, having regard to s. 8, sub-s. 2, of the Act, the objection cannot be taken in proceedings to enforce the charge upon the property to secure the apportioned amount.

*Wallasey Urban Council v. W. H. Walker & Co.* (1906) 70 J. P. 199 approved and followed.

By an originating summons the Porthcawl Urban District Council claimed against the defendants, Mary Caroline Brogden and Lucy Eleanor Brogden, (1.) a declaration that the plaintiffs were entitled to a charge upon the Esplanade Hotel and a piece of building land, both abutting upon St. Mary Street, Porthcawl, for a sum of 180*l.* 10*s.* 10*d.*, alleged to be a final apportionment for the expense of certain improvements under the Private Street Works Act, 1892, and (2.) an account of the principal, interest, and costs due to the plaintiffs, and that the charge might be enforced by sale.

At the date of the conveyance below mentioned the defendant M. C. Brogden and predecessors in title of the other defendant were the owners of land situate to the north of and fronting on the sea at Porthcawl, including the land thereby conveyed.

The conveyance, dated September 19, 1904, and made between SARGANT J. the then owners and the council, recited that the council, being desirous of having the hereditaments thereafter conveyed "dedicated to the public use and of executing certain works of improvement thereon, had applied" to the owners "to convey the same to them for that purpose," which they had agreed to do "upon and subject to performance by the council of the covenants, conditions and agreements hereinafter contained"; and it was thereby witnessed that "in consideration of the premises and of the covenants, conditions and agreements hereinafter contained, and on the part of the council to be observed and performed," there was conveyed to the council a piece of land called "The Esplanade," bounded on the north by other lands of the predecessors in title. The council covenanted to lay out the land conveyed "as and for a public highway, esplanade or promenade," and for that purpose to make suitable roads, footpaths, and works, and in the execution of the works to expend certain sums within a stated period. The conveyance ended with the following words: "And it is hereby agreed between and by the several parties to these presents that the buildings and lands occupied therewith, known as 'The Esplanade Hotel,' 'Sea Bank,' and the following dwelling-houses, namely Numbers 4, 5, 6, 11 and 12, 'The Esplanade Terrace,' and . . . all other lands of the said Mary Caroline Brogden which are not at present occupied with buildings and which abut upon the Esplanade shall be free and exempt from all charges in respect of the said works or any works under the Public Health Act, 1875, or under the Private Street Works Act, 1892, or any other similar Act for the time being in force."

On June 2, 1911, the council, under the powers conferred on them by s. 6 of the Private Street Works Act, 1892, passed a resolution requiring a street called St. Mary Street, which ran north from, and at right angles with, the Esplanade, to be drained, levelled, paved, and completed. By another resolution of January 26, 1914, the specifications, plans, sections, estimates of probable expense, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith—which had been proposed by the council's surveyor—were approved by the council. When the resolutions were passed the defendants were the owners

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SARGANT J. of the Esplanade Hotel (at the corner of St. Mary Street and the Esplanade) and certain building land abutting on one side of the street and bounded on the south by the Esplanade. The resolution of January 26, 1914, was advertised and posted up in accordance with the Act of 1892, and on February 3, 1914, a copy of that resolution, embodied in a notice of provisional apportionment, was sent by registered post to each of the defendants.

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The work was commenced in April and finished in June, 1914, at a cost of about 650*l*. In pursuance of s. 12, sub-s. 1, of the Act of 1892 the surveyor made his final apportionment, dated July 24, 1914, and therein the amount apportioned to the defendants was 180*l*. 10*s*. 10*d*. Notice of this was sent to the defendants by registered letter, but they gave no notice of objection to the council's proposals, as required by s. 7 of the Act, and no notice of objection to the final apportionment.

*Macmorran, K.C.*, and *D. Donaldson Robertson*, for the plaintiffs. This is a claim against frontagers for their proportion of the expenses of making up a new road, St. Mary Road, under the provision of the Private Street Works Act, 1892, which has been adopted by the local authority. The defendants contend that they are not liable by reason of the covenants in a deed of September 19, 1904. We say (1.) that the deed does not apply, but (2.) that, if it does, it is too late now for the defendants to raise the objection. [The argument on the first point turned on the construction of the particular words of the deed.]

As to point (2.), if we are wrong in the construction of the deed, it is too late now for the defendants to object. All the premises abutting on a street must be included in the provisional apportionment, although it may turn out that some of them may not be liable to be charged: *Herne Bay Urban Council v. Payne and Wood* (1); and under ss. 6, 7, and 12 of the Act of 1892 the defendants ought to have objected within one month from the first publication of the provisional or the final apportionment. Not having done so, they are now precluded from saying that they are not liable under s. 8, sub-s. 2, which provides that no objection which might have been raised under the Act can be subsequently otherwise made or allowed

(1) [1907] 2\_K\_B. 130.

in any Court, proceedings, or manner whatsoever: *Woodford SARGANT J.*  
*Urban Council v. Henwood* (1); *Wallasey Urban Council v. W. H.* 1917  
*Walker & Co.* (2); *Folkestone Corporation v. Rook* (3); *Bishop* PORTHCAWL  
*Auckland Urban Council v. Alderson.* (4) In *Teddington Urban* URBAN  
*Council v. Vile* (5) a frontager who failed to object at the COUNCIL  
proper time that a sewer had already been laid in front of her v.  
house by the former owner under an agreement with the local BROGDEN.  
authority was held precluded from objecting when sued for the  
expenses.

*Austen-Cartmell*, for the defendants. The words of the covenant are wide enough to show that there was a bargain that any property which was part of the property described in the deed was to be exempt from all municipal charges. The plan shows the road, or Esplanade, in respect of which charges had been incurred, and the defendants' land, which abuts on that road and is a self-contained plot of about one acre, is not laid out for buildings but indicates openings for roads. Therefore the inference is that it was possible that works would be executed on roads on the side of the plot, and St. Mary Road is in fact one of the indicated openings, and it was not unreasonable that the plot should be free of charges having regard to the land which was given up to the council. It is not suggested that the land lying at the back of that plot, and which has since been sold off and developed, is freed from charges, and it is submitted that there is nothing to justify cutting down and limiting the exempted roads to the Esplanade having regard to the contemplated new roads. The second point is that the defendants could not have raised the objection on the apportionment, which, as between them and the council, was properly made, and, if they are not liable, the amount of the apportionment could not be thrown on the other frontagers. Sect. 7 of the Act of 1892, read with ss. 14 and 22, shows instances in which the council has to bear the apportionment itself. Here the objection is not to the apportionment, but that the amount cannot be recovered by reason of the covenant, and that is an objection that does not fall within the purview of s. 7, which is directed to "liability under the Act."

(1) (1899) 64 J. P. 148.

(3) (1907) 71 J. P. 550.

(2) 70 J. P. 199.

(4) [1913] 2 K. B. 324.

(5) (1906) 70 J. P. 381.

SARGANT J. *Teddington Urban Council v. Vile* (1) is distinguishable, for  
 1917 there the objection was that the cost of a sewer that had been  
 PORTHCAWL previously laid ought not to be included in the apportionment,  
 URBAN and that was an objection to the quantum of the apportionment,  
 COUNCIL as in the other cases cited. Here the objection is not to the amount,  
 v. and it is submitted that the defendants, when sued for it, can properly  
 BROGDEN. set up a release by the deed and that this view does not conflict  
 with the authorities.

*Cur. adv. vult.*

Jan. 23. SARGANT J. The defence to the plaintiffs' claim is that the defendants have contracted out of their liability by the conveyance of 1904. To that defence the plaintiffs have two replies—namely, (1.) that on the true construction of the deed, notwithstanding the wide words used in the operative part of the deed, there is no contracting out in respect of the liability for charges of the description represented by the 180*l.* 10*s.* 10*d.* claimed; and (2.) that, even if the defence was good on the construction of the deed, the defendants have omitted to make that defence in time, and have allowed matters to go on for such a period without objection that their right to set it up is gone.

The deed was entered into at a time when the defendants or their predecessors in title were making over to the council a large amount of frontage on the seashore upon certain terms as to that and the making up of the frontage given over as an esplanade, and the words of the exemption relied on by the defendants seem to me in themselves, without reference to the rest of the document and without any cutting down by the context, to be sufficient to include the charges now in question. [His Lordship stated his reasons for this opinion, but held, on the construction of the whole deed, that the words of exemption were controlled by the context—see *Hawkins v. Gathercole* (2)—and that the defence on the deed failed.]

That really disposes of the question of liability between the parties, but, as the second point has been argued, I will express my opinion upon it. By the Private Street Works Act, 1892, provision is made for the apportionment on the various owners

(1) 70 J. P. 381.

(2) (1855) 24 L. J. (Ch.) 332.

of property fronting on a street which is about to be made up of SARGANT J. the expense of making it up. Sect. 7 provides that during a certain period—namely, one month from the publication of the resolution referred to in s. 6—“any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority” on any of several grounds. One of these grounds is “(e) That any premises ought to be excluded from or inserted in the provisional apportionment,” and another ground is “(f) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection,” and so on. Then, by s. 8, sub-s. 2, after the time for making these objections has expired, and when the district authority comes to enforce the charge under the Act, it is provided as follows: “No objection which could be made under this Act shall be otherwise made or allowed in any Court proceeding or manner whatsoever”—these words being the very widest words which could be used to prevent persons from taking an objection, before this Court or any other Court, which they might have properly taken against the apportionment under s. 7 of the Act.

Mr. Austen-Cartmell contended that, although the owners had been settled on the list, and although they had not objected, yet they did not become precluded from objecting in the future, because their objection, if made, would not have been an objection to the apportionment, but only an objection as to the persons who were liable in respect of the particular apportioned amount. I think that to adopt such a construction would be to read the scheme of the Act too narrowly. In my judgment, the scheme of the Act was to have an apportionment of the liability of particular named persons published and ascertained by the local authority, and that from that time forward—or rather from the time when the opportunity under the Act of objecting to that apportionment had passed by—the apportionment should be conclusive, so that all persons concerned should know what their position was. To my mind, it is an essential part of that construction not only that the apportioned amount should be ascertained, but that the persons liable for that amount should be ascertained; and, although it

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SARGANT J. may be that an objection as to the person liable is not an objection under head (e) of s. 7, namely, "that any premises ought to be excluded from or inserted in the provisional apportionment," nevertheless it seems to me that an objection as to the person liable does fall under head (f), which is "that the provisional apportionment is incorrect in respect of some matter of fact." If the provisional apportionment finds that a particular sum is due from X., as the owner of the property, it appears to me that the finding that X. is liable is a finding of fact; and, if Z. and not X. is the owner of the property, an objection founded upon that incorrect finding is an objection that the provisional apportionment was incorrect in respect of a matter of fact.

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I should have come to that conclusion on this legislation if there had been no authority in respect of it, but the point seems to have been decided by Bray J. in *Wallasey Urban Council v. W. H. Walker & Co.* (1) There a person had been settled as liable for an apportioned amount on the ground that he owned a wall which abutted on the road or street to be made up. As a matter of fact he did not own the wall, but he did not object until he was sued, when he raised the objection not that the apportionment was incorrect qua amount or qua the premises in respect of which it was ascertained, but that it was wrong in finding that he, and not somebody else, was the owner of the property. It was held that his objection was one which he might have raised under s. 7 of the Act, and that he was precluded from raising it when the matter came into Court. I cannot see any difference in substance between that case and the one before me. Here the defendants are not saying that they are not the owners, but they are saying that a special bargain was made with them, under which they are not liable, as otherwise they would have been, for the amount apportioned in respect of their property. If they are right in that contention, the result, if their objection had been taken in time, ought to have been that no amount was apportionable against them as owners of the property. I cannot see how that is less a question of fact than a question whether a person was or was not the owner of the property.

In my judgment, therefore, the plaintiffs are entitled to the relief

claimed by their summons. Their taxed costs must be added to SARGANT J. their charge, and there will be liberty to apply.

Solicitors for plaintiffs : *Smith, Rundell & Dods.*

Solicitors for defendants : *Lawrence Jones & Co.*

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*In re* PAWSON'S SETTLEMENT.

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HIGGINS v. PAWSON.

[1916 P. 17.]

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*Mortgage—Assignment of Interest in Personalty—Notice to Trustees of the Fund—Subsequent Payment of Income to Mortgagor—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.*

P., who was entitled to a life interest in the income of certain stocks and other personal estate vested in the trustees of a settlement, assigned all his interest under the settlement to the plaintiff by way of mortgage to secure a principal sum and interest. Shortly afterwards the plaintiff gave to the trustees the ordinary notice of the mortgage, but did not require them to pay the income to himself, and they paid it to P. for about a year and a half, when the plaintiff brought an action against P. and the trustees claiming foreclosure of the mortgage and personal payment by the trustees of the income as from the date of the notice :—

*Held*, that the giving of the notice was not equivalent to taking possession of the mortgaged property, but had no further effect in depriving the mortgagor of the receipt of income than notice of a similar mortgage of real estate, and that the claim against the trustees failed.

*Held*, also, that, if the decision was wrong, the case was one in which the Court would grant relief to the trustees under s. 3 of the Judicial Trustees Act, 1896, and that it was not necessary to plead the Act as a defence.

THE defendant J. J. Pawson was entitled, under a marriage settlement dated October 30, 1905, to a life interest in the income of certain funds vested in the trustees of the settlement, which, at the date of the hearing of the action, consisted of Cape of Good Hope 4 per cent. stock, preferred and deferred stock in an investment trust company, stocks in a railway company, a mortgage on land, and two policies of life assurance. By an indenture dated

SARGANT J. September 15, 1914, Pawson assigned all his interests under the  
1917 settlement to the plaintiff by way of mortgage to secure 566*l.* 6*s.* 8*d.*  
PAWSON'S and interest thereon. The 566*l.* 6*s.* 8*d.* was made up of two sums of  
SETTLEMENT, 300*l.* and 266*l.* 6*s.* 8*d.*, for which two promissory notes had been  
*In re.* given, and which were repayable by equal instalments at intervals  
HIGGINS of three calendar months. By the mortgage the defendant cove-  
v. nanted with the plaintiff "to pay him the sum of 566*l.* 6*s.* 8*d.* in  
PAWSON, the manner prescribed in the said promissory notes, and, if not so  
paid, to pay interest on all overdue instalments at the rate of 10 per  
cent. per annum." On November 4, 1914, the plaintiff sent to the  
solicitors of the trustees a letter, in which he said, "I beg to give  
you notice that by an indenture dated 15th September, ulto.,  
Mr. John Jervis Pawson, for the consideration therein stated,  
assigned in my favour all his interests of whatsoever nature and  
kind to which he is entitled under" the settlement. "Will you  
kindly acknowledge receipt of this notice on behalf of all the trustees,  
or obtain the acknowledgment of same, for which I shall be happy  
to pay your charges." The receipt of this notice was duly acknow-  
ledged by the trustees' solicitors, and no notice to pay the income  
or demand for payment of it to the plaintiffs was ever sent to  
the trustees, who continued to pay the income to Pawson. On  
January 6, 1916, the plaintiff commenced this action against  
Pawson and the trustees, in which he claimed (1.) a declaration that  
under the settlement the plaintiff was entitled to be paid all the  
income which since November 9, 1914, had become payable under  
the settlement to Pawson, and all income which would become  
payable thereunder to him until the moneys secured by the plaintiff's  
mortgage were fully paid and satisfied; (2.) an account of the income  
which since November 9, 1914, had become payable to Pawson  
under the settlement "and payment thereof by the trustees to the  
plaintiff"; (3.) to have the mortgage enforced by foreclosure;  
(4.) to have the settlement trusts carried into execution by the  
Court.

*Romer, K.C.*, and *Copping* (for *C. A. Bennett*, serving with His Majesty's Forces), for the plaintiff. In *Lewin on Trusts*, 12th ed. p. 403, there is the following passage: "After notice of an assignment the trustee cannot safely pay either principal or interest to

the assignor, though the assignment be by way of mortgage only, SARGANT J. for though a mortgagor in possession of real estate is not accountable for the *rents* until notice of the mortgagee's intention to enter, it cannot be assumed that the like rule will apply to personal estate in the hands of a trustee, as to which it has been said that the act of giving notice to the trustee is equivalent to taking possession." That is supported by the authorities, there cited, of *Cresswell v. Dewell* (1), *Mack v. Postle* (2), *Loveridge v. Cooper* (3), and *Ward v. Duncombe* (4), and by *Dearle v. Hall*. (5) The mortgage and notice created the same position as does an assignment of book debts with notice to the debtors.

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*Dighton Pollock*, for the defendants. It is quite contrary to the practice to treat a simple notice of a mortgage of personalty as a notice to pay the income to the mortgagee. It does not seem to have occurred at the time, even to the plaintiff, that that was the effect of the notice, inasmuch as for over a year he abstained from requiring the income to be paid to himself. The cases cited are all on the question of priority. In any case the defendants should be relieved under the Judicial Trustees Act; and that notwithstanding that the Act is not specially pleaded: *Singlehurst v. Tapscott Steamship Co.* (6)

SARGANT J. In this case the plaintiff brings his action against Mr. Pawson, who is entitled to a life interest in personal estate comprised in a marriage settlement, and also against the trustees of that settlement, in whom the funds are vested. On the claims against Mr. Pawson I declare that the plaintiff has a mortgage on Mr. Pawson's life interest and grant him the usual foreclosure judgment nisi.

The plaintiff's claim against the trustees of the settlement is unusual, and is a very bold and almost preposterous claim. The plaintiff gave notice of his mortgage to the trustees' solicitors, and after a little delay the receipt of the notice was duly acknowledged. I am satisfied that the plaintiff intended to give the notice in order to perfect his title as mortgagee and for no other purpose. After

(1) (1863) 4 Giff. 460.

(2) [1894] 2 Ch. 449.

(3) (1828) 3 Russ. 1, 58.

(4) [1893] A. C. 369.

(5) (1828) 3 Russ. 1.

(6) (1899) 107 L. T. Jo. 347.



SARGANT J. the receipt of the notice the trustees, as might have been expected,  
 1917 continued to pay the income of the trust funds to the tenant for life,  
 PAWSON'S and it was not until nearly a year and a half after the notice had been  
 SETTLEMENT, given that a claim was made against the trustees that they were  
*In re.* personally liable to the plaintiff for not paying the income to him  
 HIGGINS instead of to the tenant for life, and that the notice of the mortgage  
*v.* was, as a matter of law, equivalent to entering into possession of  
 PAWSON. the income of the trust funds.

In my judgment that is not the law. Certainly it was never intended or thought that the notice of the mortgage should have, nor do I think it had, any such effect. I am surprised that such a claim as that now made against the trustees should be made; but, as it has been made, I have to deal with it. The claim is said to be justified by some statements made in *Dearle v. Hall* (1) and other cases to the effect that notice to trustees of a mortgage of personalty vested in them is equivalent to entering into possession of the mortgaged property by the mortgagee. I do not, however, think that in any case it has been laid down that the giving of the notice is taking actual possession of the fund. Indeed, I notice that in *Ward v. Duncombe* (2) Lord Macnaghten quotes, without disapproval or criticism, the following words of Lord Lyndhurst L.C. in *Dearle v. Hall* (1): "In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund." That is to say, the mortgagee by giving notice of his mortgage perfects his title to the fund.

In the case of a mortgage of real estate, whether held in fee simple or for life, the mortgagor, in the absence of notice by the mortgagee to the tenants to pay the rents to him, is undoubtedly entitled to remain in possession of the rents and profits, and that is the ordinary understanding as to the income of personal property which has been mortgaged. I am not prepared to say, without definite authority—which has not been shown to me—that the mere giving notice of the existence of a mortgage of personal property to the trustees holding that property has any further effect in depriving the mortgagor of the receipt of income than it would have in the case of a mortgage of real estate. Accordingly,

(1) 3 Russ. 1, 58.

(2) [1893] A. C. 369, 387.

I hold that the plaintiff is not entitled to recover from the trustees SARGANT J. personally the income paid by them to the tenant for life.

If I were wrong in this decision, I should grant relief to the trustees under s. 3 of the Judicial Trustees Act, 1896, which does not, as the case cited to me shows, need to be pleaded as a defence to the claim.

The action, as against the trustees, must be dismissed with costs.

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Solicitors for plaintiff: *Davis & Taylor.*

Solicitors for defendants: *Rawle, Johnstone & Co.*

F. E.

*In re* HAYMAN, CHRISTY & LILLY, LIMITED (No. 2). ASTBURY J.

CHRISTY v. THE COMPANY.

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[1916 H. 886.]

*Landlord and Tenant—Landlord's Property Tax—Arrears of Rent—Insolvent Company—Receiver for Debenture-holders—Agreement to pay Rent during Occupation—Deduction of Tax on Arrears of previous Financial Year—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. A, No. IV., Rule 9—Income Tax Act, 1853 (16 & 17 Vict. c. 34), ss. 35, 40—Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.*

On taking possession of an insolvent company's premises a receiver and manager appointed in May, 1916, in a debenture-holders' action agreed with the landlord to pay rent during his occupation at the rate reserved by the leases.

Being subsequently required to pay landlord's property tax for the financial year 1915-16 anterior to his appointment, for which year no rent had been paid, the receiver paid the tax and deducted it from his first payment of rent in the current financial year 1916-17:—

*Held*, (a), that the deduction was lawful under the Income Tax Act, 1842, s. 60, Sched. A, No. IV., Rule 9, and the Income Tax Act, 1853, s. 40, and (b) that it was not precluded by the agreement.

*In re Sturmeys Motors, Ltd.* [1913] 1 Ch. 16 applied.

# SUMMONS.

The above company held certain premises from the applicant under leases expiring Christmas, 1918, at a total rent of 950l.

ASTBURY J. On May 12, 1916, a receiver and manager was appointed in the  
 1917 above debenture-holders' action, without any direction for delivery  
 HAYMAN, of possession of the premises, and on May 23, 1916, the company,  
 CHRISTY & LILLY, which was insolvent, went into voluntary liquidation.  
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At that time the rent was 1022*l.* in arrear, and on taking possession the receiver agreed with the applicant to pay rent for the premises during his occupation at the rate reserved by the leases.

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Shortly after this the receiver found that 142*l.* 10*s.* was due to the Inland Revenue for landlord's property tax under Sched. A, being 3*s.* in the pound on the unpaid 950*l.* rent for the year ending April 5, 1916. Being pressed by the collector of income tax he paid this amount and subsequently deducted it from the 352*l.* 6*s.* 8*d.* rent accruing from May 12 to September 29, 1916, paying only the balance of 209*l.* 16*s.* 8*d.* to the applicant on December 5, 1916.

On January 15, 1917, the applicant, who had not received any rent in respect of the 1022*l.* arrears, issued this summons for a declaration that the receiver was not entitled to deduct from the rent payable to the applicant the sum of 142*l.* 10*s.*, or any sum on account of income tax paid by him in respect of rent not paid by the company or the receiver to the applicant, and that the receiver might be ordered to make good such deduction, or in default that the applicant might be at liberty to distrain on property in the possession of the receiver or to proceed by action against the receiver.

*Edward Beaumont*, for the applicant. The Income Tax Act, 1842, s. 60, Sched. A, No. IV., Rule 9, provides that "the occupier of any lands . . . being tenant . . . and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord . . . as a rate of [seven pence] for every twenty shillings thereof would . . . amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; . . . and all landlords . . . shall allow such deduction upon receipt of the residue of the rent . . .; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable."

The Income Tax Act, 1853, s. 35, provides that "Where any occupier for the time being of any lands . . . being tenant

thereof, shall be . . . . required to pay, and shall have paid, any sum . . . . assessed upon . . . . such lands . . . . under the said Schedule A . . . . and which said sum . . . . ought . . . . to have been paid . . . . by any former tenant or occupier . . . . it shall be lawful for the said occupier for the time being to deduct . . . . from . . . . any subsequent payment of rent . . . . the said sum . . . . which ought to have been . . . . paid by such former tenant or occupier . . . . Provided that nothing in the Income Tax Act, 1842, or in this Act . . . . shall . . . . authorize the levying upon any such occupier for the time being any arrear of duty assessed under Schedule A . . . . which ought to have been levied upon and ultimately paid and borne by any former occupier."

Sect. 40 provides that "Every person who shall be liable to the payment of any rent . . . . shall be entitled . . . . on making such payment, to deduct . . . . thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable . . . . Provided always, that no tenant or occupier of any property chargeable under Schedule A . . . . shall be entitled to deduct . . . . out of the rent thereof any greater sum than the amount of the duty which shall have been assessed . . . . upon . . . . such property, and actually paid by such tenant or occupier."

The Revenue (No. 1) Act, 1864, s. 15, recites s. 40 of the Income Tax Act, 1853, and provides that "the persons liable to and making any such payment as aforesaid shall be entitled . . . . to deduct . . . . thereout the amount of the rate . . . . of income tax . . . . chargeable by law upon . . . . such rent . . . . during the period through which the same was accruing due, anything in the said recited Act to the contrary notwithstanding."

Now, apart from the exceptional provisions of s. 35 of the 1853 Act, these sections plainly imply that the tax is to be deducted from the rent in respect of which it is payable. If the receiver paid the arrears of rent for 1915-16 he could deduct the 14*l.* 10*s.*, but he is not entitled to deduct it from the rent of 1916-17. If the company

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ASTBURY J. were paying the rent the question would not arise, as the payment would be attributed to the arrears and the deduction would be justifiable. But the receiver is blowing hot and cold. He is paying rent expressly for 1916-17 and deducting tax not attributable to that year at all. As he will also pay and deduct the tax for 1916-17 in due course, there will be two years' taxes thrown on one year's rent, which was clearly not the intention of the Legislature.

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The only person who can deduct the tax of a past financial year from the current year's rent is a new tenant under the special provisions of s. 35 of the 1853 Act. If the receiver had been a new tenant he might have deducted the tax, though no distress could have been levied, as the collector had ample opportunity of distraining on the company then in occupation: *Reading v. Chew*. (1) But in this case the receiver is not a new tenant. He is merely continuing the company's tenancy, and s. 35 does not apply.

The payment of the tax was quite unnecessary, as if the collector had been informed that the rent for 1915-16 was unpaid and irrecoverable he would have amended the demand note accordingly: *Underhay on Income Tax*, p. 15.

The receiver's agreement to pay rent during his occupation really amounted to an agreement to pay the whole current rent subject to deduction of property tax on that rent only.

*W. M. Hunt*, for the company. The right of deduction is not limited in the way the applicant contends: *Clennell v. Read*. (2) The receiver is not a new tenant or occupier: *In re Marriage, Neave & Co*. (3); and he was bound to pay the tax under pain of distress. If he had been a new tenant or occupier, s. 35 of the 1853 Act would have applied, but no such provision is required in the case of a continuing tenancy.

*Owen Thompson*, for the plaintiff and the receiver. The receiver was bound to pay. Although a landlord's tax as between landlord and tenant, the tax is really on the occupier, with a right to deduct from the landlord's rent. The receiver was not concerned with any question of over-assessment. That was the applicant's business. (4)

(1) (1898) 78 L. T. 681; 14 Marsh. 371.  
Times L. R. 468; 3 Tax Cas. (3) [1896] 2 Ch. 663.  
625.

(4) Vide *Swatman v. Ambler*  
(2) (1816) 7 Taunt. 50; 2 (1854) 24 L. J. (Ex.) 185.

The special agreement was necessarily subject to all statutory rights of deduction : *In re Sturmev Motors, Ld.* (1)

*Edward Beaumont* in reply. In that case the company owed four years' arrears of rent, but had paid the property tax. The receiver was allowed to deduct the current property tax from the current rent and the tax already paid from the arrears of rent when he paid them. That is exactly my contention here.

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ASTBURY J. (after stating the facts and reading Sched. A, No. IV., Rule 9, and the Income Tax Act, 1853, s. 40). The applicant contends that the deduction of tax on the arrears of rent anterior to the receiver's appointment and occupation was invalid. But the Income Tax Act, 1853, s. 40, in no way limits the deduction to the duty payable in respect of the period for which the rent is paid, but authorizes a deduction of the amount of duty then payable. If the occupier for the time being happens to be a new tenant it is lawful for him under the Income Tax Act, 1853, s. 35, to deduct duty that ought to have been paid by a former tenant or occupier, and I should have thought a fortiori if he is a continuing tenant or occupier he may deduct duties that ought to have been paid, not by a former tenant or occupier, but by himself or the person he represents.

The applicant also contends that the receiver has agreed to pay the whole current rent during his occupation. But the agreement must be construed as an agreement to pay the current rent subject to the statutory deduction of duty. This was the view taken in *In re Sturmev Motors, Ld.* (1)

To the extent that any part of the duty paid may be recoverable from the Inland Revenue on the ground that the rent in respect of which it was paid is irrecoverable, I think that the applicant, and not the receiver, is the right person to apply.

The summons must be dismissed with costs.

Solicitors : *Clarke, Rawlins & Co. ; Ward, Perks & Terry ; Lambert & Hale.*

(1) [1913] 1 Ch. 16. [This case is fully discussed by E. F. in 134 L. T. Jo. 324.]

G. R. A.

NEVILLE J. *In re* AN APPLICATION BY WILLIAM CRAWFORD & SONS,  
 1917 LIMITED, FOR THE REGISTRATION OF A TRADE  
 Feb. 8, 9, 12. MARK, No. 366,496.

[1916 W. 758.]

*Trade Mark—Application to register—Surname—“Crawford”—Distinctive Word—User with registered Trade Mark—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9, sub-s. 5.*

An application by William Crawford & Sons, Limited, for leave to proceed under s. 9, sub-s. 5, of the Trade Marks Act, 1905, with the registration of the surname “Crawford” as a trade mark in class 42 for biscuits, cakes, and shortbread was refused, although the name was identified with their goods and they had for some seventy years used the word “Crawford’s” on their labels and in their advertisements to distinguish their goods and had acquired a most extensive trade throughout Scotland and in England, it appearing that “Crawford” was a common surname in Scotland, in the sense of being shared by many persons, and not uncommon in England.

*In re Cadbury Brothers’ Application* [1915] 1 Ch. 331 distinguished.

*Semble*, the fact that a trader to identify his goods uses for many years on the labels and in the advertisements of his goods a name, and also his registered trade mark not having any reference to the name, militates against the name being per se capable of registration as a trade mark.

#### MOTION.

This was an application by William Crawford & Sons, Limited, by the direction of the Board of Trade, for an order that the Registrar of Trade Marks might be directed to proceed with their application for the registration of the trade mark “Crawford” in class 42 in respect of biscuits, cakes, and shortbread. The case lodged by the applicants stated:—

“1. The applicants and their predecessors in business have been engaged in the manufacture and sale of biscuits, cakes, and shortbread for upwards of 100 years, and the words ‘Crawford’ and ‘Crawford’s’ have continuously for over 70 years from before the date of the present application been used in connection with all biscuits, cakes and shortbread made and sold by the applicants.

“2. The name ‘Crawford’ or ‘Crawford’s’ has been directly applied to the goods, and to the cases containing the same, as well

as upon circulars, pamphlets, handbills and advertisements describing and advertising the goods. NEVILLE J.

" 3. The applicants are the registered owners of the trade marks No. 297,810 dated 8th November, 1907, No. 310,383 dated 11th February, 1909, and No. 340,466 dated 21st February, 1912.

" 4. The applicants and their predecessors in business are it is believed the sole sellers or traders in biscuits, cakes or shortbread under the name of 'Crawford' or 'Crawford's' in the United Kingdom; and biscuits, cakes and shortbread called and marked by the name 'Crawford' or 'Crawford's' have become known all over the country and in the trade to mean solely the goods of the applicants William Crawford & Sons, Ltd.

" 5. The applicants and their manufactures have become well and widely known to the trade in general and to the public by the large sales that have been effected by the applicants, upwards of 4,000,000 boxes being sold yearly in the United Kingdom and in other parts of the world; and the name 'Crawford' or 'Crawford's' has also become widely known to the trade in general and to the general public who purchase such goods by exhibiting at exhibitions in different parts of the United Kingdom and also by issuing advertisements, pamphlets, handbills, and various other methods of commerce for making the applicants' goods known to possible purchasers.

" 6. The words 'Crawford' or 'Crawford's' it is believed have become distinctive of the applicants' goods and adapted to distinguish their goods from those of other persons."

A number of affidavits were filed in support of the application, and some of the deponents were cross-examined. It appeared that the business was established in 1813. From 1842 it was carried on under the name of William Crawford & Sons, and in 1905 it was turned into a limited company. The head office and works of the company were at Liverpool, with branches at Edinburgh and London. Throughout Scotland they had most extensive sales and also in the North and Midlands of England, and to some extent in the South of England and Wales, and also abroad, but the company did not sell or advertise their goods in Ireland. The words "Crawford's Biscuits" in large letters had for many years been used with one of the registered trade marks on the wrappers and

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NEVILLE J. labels on the tins and boxes containing the applicants' goods, but  
 1917 the word "Crawford" alone had only been stamped for some  
 { WILLIAM years on some of their goods. It was, however, admitted on the  
 CRAWFORD cross-examination that the word "Crawford" was a common  
 & SONS' surname in Scotland and not uncommon in England, and that  
 APPLICA- there was a Crawford in Edinburgh engaged in the same business  
 TION. as the applicants, but he was a relative and did not oppose the  
 application. Other material facts are sufficiently noticed in the  
 arguments and judgment.

*Ward Coldridge, K.C.*, and *E. Lever*, for the motion. It is desired to register the word "Crawford," not "Crawford's." The question turns on s. 3 and sub-s. 5 of s. 9 of the Act. A surname is capable of registration as a trade mark. It is an issue of fact, and, admitting that the evidence must be closely scrutinized, each case must be decided on its own merits: *In re Teofani & Co.'s Trade Mark*. (1) Here on the evidence the name "Crawford" or "Crawford's" has become distinctive of, and is adapted to distinguish, the goods of the firm, and the registration of the word will not interfere with any other bona fide trader. The facts are very similar to those in the case of *In re Cadbury Brothers' Application* (2), on which we rely. The firm are desirous of registering "Crawford" as their trade mark in certain foreign countries, but find they cannot do so unless it is first registered here as their trade mark.

*Austen-Cartmell*, for the Board of Trade. "User" in s. 9 of the Act means user in fact of the mark proposed to be registered as a trade mark. Here the word used has been "Crawford's," not "Crawford," except in a few instances. The Court should be slow in exercising its discretion in favour of a surname. *Teofani's Case* (1) shows that the name must be rare or uncommon. *In re Joseph Crossfield & Sons, Ltd.* (3), *In re R. J. Lea's Application* (4), and *In re Pope's Electric Lamp Co.'s Application* (5) are instances of the registration of a surname being refused. *In re Cadbury Brothers' Application* (6) went very far, but it is distinguishable. The application was not opposed and the evidence was very strong. The word "Cadbury"

(1) [1913] 2 Ch. 545, 568, 573.

(4) [1912] 2 Ch. 32; on appeal

(2) [1915] 1 Ch. 331.

[1913] 1 Ch. 446.

(3) [1910] 1 Ch. 130, 144.

(5) [1911] 2 Ch. 382.

(6) [1915] 1 Ch. 331, 337, 339.

was already on the register and it was a household word throughout the United Kingdom, and the application was to extend the trade mark to other goods in the same class. "Crawford" is not known in Ireland, and it is not a household word throughout the United Kingdom and is not on the register. Accepting *Cadbury's Case* (1) as rightly decided, it is an exception to the rule that a surname must be rare or exceptional. "Crawford" is not an uncommon name, and to allow the application to proceed on the ground that the word is distinctive of the applicants' goods will make it very difficult to draw the line at any surname. The fact that they want to register the name abroad as their trade mark is no reason for allowing the application to proceed.

*Ward Coldridge, K.C.*, in reply. A word may be distinctive and adapted to distinguish the goods of a trader although there has been no user as a trade mark : *In re Cadbury Brothers' Application*. (1) The applicants have pushed their trade in all parts of the world except Ireland, and have proved that "Crawford" or "Crawford's" is distinctive of their goods. The surname "Callender" has recently been registered as a trade mark in connection with electric cables. [Sebastian on Trade Marks, 5th ed., p. 369, and *Registrar of Trade Marks v. W. & G. Du Cros* (2) were also referred to.]

NEVILLE J. The duty of considering whether leave should be granted to proceed with the registration of a surname is certainly one which imposes on the Court a very difficult task. The matter is not to be treated as though it were entirely free from authority. It is true that there is a discretion given to the Court, and its duty is to protect the public and, in a case where it thinks that no public disadvantage would follow, to direct the registration to be proceeded with, leaving it to any individuals who may unintentionally have been injured by the registration of the mark, or who are likely to be injured by the registration of the mark, to set up their private rights as a bar to the registration. The Court, although it has a discretion, has to arrive at a conclusion of fact, or, as Buckley L.J. puts it in the case of *In re R. J. Lea's Application* (3), has to

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(1) [1915] 1 Ch. 331, 337, 339.

(2) [1913] A. C. 624.

(3) [1913] 1 Ch. 446, 456.

NEVILLE J. form an opinion upon the facts, and has to see that the name in question is adapted to distinguish the goods in question as the goods of the particular maker who desires to register the mark.

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In the present case I think that if the only consideration was whether a trade of a particular kind had been identified under a certain name with a particular firm for a long time the Court could come to no other conclusion upon the evidence but that the applicants, whose business has been carried on under the name of Crawford over seventy years, have established a very wide reputation, and that a great many people throughout the United Kingdom, Ireland being excepted, particularly those who have dealt in the biscuits, have always identified them as the biscuits of these particular makers. Indeed, I think the reputation is somewhat wider than that, and I dare say a good many people who were not dealers, and people who were not consumers of those biscuits, may have known that they were the biscuits of and were made by William Crawford & Sons, and were sold as "Crawford's biscuits." But I think after the decision of the Court of Appeal in *In re Teofani & Co.'s Trade Mark* (1), in which so much was said as to the rarity of a surname desired to be registered in this country, it is impossible for me to disregard the question as to whether the surname itself is a name which is a common name—I mean in the sense of being a name which is shared by a great number of people—or whether it is, like Teofani or Muratti, a name which, so far as this country is concerned, is rare and exceptional. Of course there is a difference in degree, but if the name "Crawford" is held to be adapted to distinguish the goods of a particular maker it is quite clear that, the evidence being sufficient, the name "Smith" or "Brown" might be equally adapted to distinguish the goods of manufacturers of that name, and if that is so you give the go-by entirely to the insistence the Court of Appeal laid upon the rarity of the name in question. Consequently I think I am bound to take into consideration the fact that I am dealing with a name which belongs to many. There is another matter that I cannot fail to observe, and that is that, although the goods have been identified with the name of "Crawford's" owing to the methods of sale and of advertisement which have been adopted by the applicants and their predecessors,

(1) [1913] 2 Ch. 545.

still it seems to me that the name "Crawford" has not been used as a trade mark. It is a difficult point, but I think where what a trader or manufacturer has done has been merely to connect the goods with his own name, and particularly where while he was doing that he was at the same time endeavouring to identify the goods by a particular trade mark having no reference to his name, it cannot be said that the name has been used as a trade mark. What I mean is that where you sell biscuits as "Crawford's biscuits," and at the same time stamp upon the goods a trade mark which you call attention to as a trade mark, nobody would suppose that "Crawford's" was any more than a statement that those goods were made by the firm whose name appears, and if anybody were to ask what trade mark Crawfords sold under he would say the trade mark which is used upon the goods of Crawfords. Therefore I have here a case where the name is a name which is in common use, and where the name has not, in the view I take, been used as a trade mark for any considerable period, at all events prior to the date of the application for registration. Having regard to what was said by the Court of Appeal in *In re Teofani & Co.'s Trade Mark* (1), I should not, but for my own decision in *In re Cadbury Brothers' Application* (2), have the difficulty that I feel in the present case. But undoubtedly there is a distinction between *Cadbury's Case* (2) and the present case which appears to me to be of considerable importance. There the name "Cadbury" had been on the register as a trade mark for a long period in respect of certain goods sold by the Cadbury firm, and it was a little difficult to say that a name which they had used as a trade mark and had upon the register as their trade mark for a great number of years was not adapted to distinguish their goods from the goods of other persons. In that case undoubtedly with regard to cocoa and chocolate, which were the earlier subject-matters of their manufacture, "Cadbury" was a mark which was identified in the minds of the public with their goods, and it seems to me that different considerations arise when a man comes and says "The mark 'Cadbury' is identified with my goods, and I wish to extend that mark to all the goods I now sell." It seems to me the fact of registration is an indication that the name is adapted for the

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(1) [1913] 2 Ch. 545.

(2) [1915] 1 Ch. 331.



NEVILLE J. purpose of distinguishing the goods of the particular trader ; but  
 1917 be that as it may, I think that *Cadbury's Case* (1) has gone the  
 WILLIAM extreme length of the allowance of the registration of a surname  
 CRAWFORD as a trade mark, and that if I were to direct the present application  
 & SONS' to proceed, great as is the trade of Crawfords and widely extended  
 APPLICATION. and well known as it is, I should necessarily be letting in a flood  
 of applications which, if they were granted, would result in a  
 state of things which was not contemplated or intended by the  
 Legislature in the Acts which have been passed with regard to trade  
 marks. I feel considerable regret that I am forced to come to this  
 conclusion, but I do not think I should be justified in giving leave  
 to proceed with the registration.

Solicitors : *Percy Short ; Solicitor to Board of Trade.*

H. L. F.

NEVILLE J.

*In re D'OYLY.*

1917

VERTUE v. D'OYLY.

Feb. 15.

[1916. D. 1305.]

*Will—Construction—Settled Legacy—"Free of duty"—Future Estate  
 Duty—Incidence—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5,  
 sub-s. 1—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.*

A testatrix, after giving numerous pecuniary legacies "free of duty," gave to trustees "the sum of 7000*l.* free of duty" upon trust for A. for life, and after his death upon trust for his wife and children ; and the testatrix gave the residue of her estate, "after payment thereof of her just debts, funeral and testamentary expenses and the duties on the thereinbefore mentioned legacies," to B. absolutely. Between the date of the will and of the death of the testatrix s. 14 of the Finance Act, 1914, came into operation, which abolished the relief from estate duty given by s. 5, sub-s. 2, of the Finance Act, 1894, and the question arose whether the estate duty which under s. 14 of the Act of 1914 would be payable on the death of A. in respect of the legacy of 7000*l.* ought to be borne by the corpus of the legacy or by the residuary estate :—

*Held*, that upon the true construction of the will the words "free of duty" were limited to the duties presently payable on the death

(1) [1915] 1 Ch. 331.

of the testatrix in respect of the legacy, and did not extend to any estate duty that might become payable on the death of A. ; and that on payment of the legacy to the trustees without deduction there was no obligation to retain any part of the residuary estate for any claim that might arise for such estate duty.

NEVILLE J.  
1917  
D'OYLY,  
*In re.*  
VERTUE  
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#### ADJOURNED SUMMONS.

Dame Elinor D'Oyly by her will, dated September 14, 1911, appointed the plaintiff and another person (since deceased) executors and trustees of her will, and after giving numerous pecuniary legacies which she directed should be paid "free of duty," and that the duties thereon should be paid out of her residuary estate, gave to her trustees "the sum of 7000*l.* free of duty" upon trust to invest as therein mentioned, and to stand possessed of such investments upon trust during the life of Henry D'Oyly Bernard to pay him the income thereof, and after his decease to pay the same to his wife for her life, and after the decease of the survivor of them upon trust, as to capital and income, for all the children of Henry D'Oyly Bernard by his said wife who should be living at the decease of such survivor and the issue of any of them who should have previously died leaving issue living who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry in equal shares, such issue to take only the share of their deceased parent ; and in case there should be no such child or issue who should become entitled as aforesaid, then the testatrix directed that the investments then representing the said sum of 7000*l.* should fall into and form part of her residuary estate. And the testatrix gave the residue of her estate, "after payment thereof of her just debts, funeral and testamentary expenses and the duties on the thereinbefore mentioned legacies," unto Mary Lushington Bernard absolutely.

The testatrix died in December, 1914.

Henry D'Oyly Bernard had two children only by his said wife, both of whom were infants.

Mary Lushington Bernard had executed a settlement on her marriage in 1877, and her interest under the will of the testatrix was caught by the after-acquired property clause in her settlement. She had since the death of the testatrix changed her surname from Bernard to Bernard-D'Oyly.

NEVILLE J. All the funeral and testamentary expenses and debts of the testatrix had been paid, and also the pecuniary legacies and legacy duties, including the legacy duty on the capital value of the legacy of 7000*l.*, and there remained a considerable residuary estate.

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Between the date of the will of the testatrix and of her death the Finance Act, 1914, came into operation, which by s. 14 repeals s. 5, sub-s. 1, of the Finance Act, 1894, and the question arose whether, having regard to the words "free of duty" in the will, the estate duty, which under s. 14 of the Act of 1914 would be payable on the death of A. in respect of the legacy of 7000*l.*, was payable out of the residuary estate of the testatrix or ought to be borne by the legacy. The surviving trustee issued a summons to determine the matter.

*Crossman*, for the plaintiff, stated the facts and the question for decision, and referred to *In re Snape* (1), *In re Palmer* (2), *In re Hatch* (3), *In re Stoddart* (4), *In re Gunn* (5), and *In re Tinkler*. (6)

*A. L. Morris*, for the residuary legatee. Future duties in respect of the legacy must come out of the legacy, and not out of the residuary estate. No general principle of construction can be laid down; each case must depend upon the language of the particular will. Here the words "free of duty" mean free of all such duties as are immediately payable at the date when the legacy of 7000*l.* is handed over by the executors or appropriated by them as trustees: *In re Palmer* (7); *In re Stoddart* (4); *In re Gunn*. (5) The testatrix makes a direct gift of her residuary estate and contemplates it being handed over to the residuary legatee as soon as the pecuniary legacies and duties are paid. But if the future estate duty in respect of the legacy is thrown on the residue, the executors must hold up the residue until the death of Henry Bernard D'Oyly, and that means an indefinite number of years.

*Stamp*, for the infant children of Bernard D'Oyly. The fact that the residue is given immediately does not decide the point, because the direction to pay the duties comes before it and involves

(1) [1915] 2 Ch. 179.

(4) [1916] 2 Ch. 444.

(2) [1916] 2 Ch. 391.

(5) [1916] W. N. 283.

(3) [1916] W. N. 240.

(6) *Ante*, p. 242.

(7) [1916] 2 Ch. 391, 401.

holding up the residue until the duties are paid. It is merely a general direct gift after payment of all the charges. The nearest case to this is *In re Turnbull* (1), where the words were "free from duty." A direction to pay a legacy free of duty is in itself an additional legacy and a gift of all duties existing at the death of the testator, although some of them may be contingent. The statute throws the burden of the duty on the legacy unless the will by express words shifts the burden on to the residue. Here estate duty will be payable on the death of the tenant for life out of the legacy unless, as in *In re Turnbull* (1), there is something in the will that throws it on the residue. Here there is substantially the same direction as in that case, which in that case threw settlement estate duty on to the residue.

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NEVILLE J. The question I have to decide in this case depends on the construction of the three words "free of duty" in the will. But the result will be important because they are three words which are introduced into a very great number of wills, and therefore a decision upon this particular will in this regard will no doubt affect many others.

I have with the help of counsel studied the will, and I cannot find in it anything which either adds to or subtracts from the words "free of duty" which accompany the gift of the legacy of 7000*l.* Therefore it comes to this: What does a testator mean when in his will he gives a legacy "free of duty" without assisting in any way the interpretation of those words? We have of course to suppose that the testator at the time of his death is speaking with a knowledge of the legal result of the words he uses, to this extent, that he is supposed to know the statutory obligations which will attach to his estate upon his death. Now I think that if a testator gives a legacy "free of duty" he means that his legatee is to have paid to him the legacy net, and I do not see in this regard any distinction between a direction to pay the legacy to trustees for the legatee and a direct gift to the legatee. It seems to me that in either case the effect of the words used is identical. Then does a testator mean more than that when he gives a legacy "free of duty"? Does he mean the legacy

(1) [1905] 1 Ch. 726, 732.



NEVILLE J. is to be protected and indemnified against "any obligations now existing or hereafter to be imposed which may have to be satisfied by persons in enjoyment of the legacy" ? In the case of a direct legacy once and for all the point does not arise ; but in the case of a settled legacy where the testator anticipates the enjoyment of the legacy first by one person and then by another in succession, the point arises that the Legislature has imposed on the death of a life tenant a duty, called estate duty, which has to be paid before the person entitled in remainder can enjoy the succession. Does the testator mean that that estate duty shall be paid or provided for under the words "free of duty" that he has used ? It seems to me that he does not. I think that where legatees are entitled in succession and there has been paid to their trustees or appropriated by their trustees the amount of the legacy free from any deduction they have the benefit that the testator intended for them by his will ; and therefore I come to the conclusion in the present case that upon payment of the duties payable by the executors upon the testator's death and the transfer of the 7000*l.* to the persons interested effect has been given out of the testator's estate to the total amount of his benefaction, and no further imposts payable at a future time or under any future legislation create any claim on the part of the legatee against the residue of the estate. I do not think it ought to be taken into consideration as affecting the use of particular words in the will, but it should be borne in mind that the result of interpreting the words "free of duty" to cover all future duties existing or non-existing would have the effect in many cases of practically preventing the distribution of the estate for a number of years, inasmuch as the amount that may be required to satisfy such an obligation is an unknown and an unascertainable amount ; and I think one may go so far as to say one would want words in a will which were at all events indicative that, notwithstanding this remarkable result, the testator did indeed intend the legatee to be protected from all future payments before the Court would put such an interpretation upon these words, which it seems to me are amply satisfied by saying that it involves the payment of the legacy to the legatee or to the trustees without deduction, and no more. There will be a declaration that according to the true construction of the will the gift of the legacy of 7000*l.* "free of

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D'OYLY,  
*In re.*VERTUE  
*v.*

D'OYLY.

duty " does not extend to any estate duty which may become NEVILLE J.  
payable on the death of the tenant for life in respect of the legacy 1917  
by virtue of s. 14 of the Finance Act, 1914, and that any such duty D'OYLY,  
will not be payable out of the general estate of the testatrix. *In re.*

*Stamp.* Your Lordship's decision is limited strictly to estate  
duty ?

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NEVILLE J. Yes. I intend it to be quite clear that I lay down  
no principle of construction, but, having this will before me and the  
fact that there is an estate duty payable on the death of the tenant  
for life, I decide upon the construction of these three words in this  
particular will that, the executors having paid the 7000*l.* to the  
trustees without deduction, there is no obligation to reserve any  
part of the residuary estate for any claim that may arise on the  
death of the tenant for life.

Solicitors: *Guscotte, Wadham & Daw; Marston & Robinson;  
Sandford & Co.*

H. L. F.

ASTBURY J.

1917

March 6, 7.

*In re* EVE.

HALL v. EVE.

[1917 E. 84.]

*Will—Death Duties—Settled Legacy—Cesser of Life Interest—Estate Duty—Will made in 1910—Death in 1915—Direction that all “Gifts bequests and legacies” shall be “free of duty”—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14.*

By her will, dated August 31, 1910, a testatrix, after giving certain specific and pecuniary legacies, gave (clause 8) 8000*l.* to her trustees upon trust for a life tenant and remaindermen.

By clause 9 she declared that “all the foregoing gifts bequests and legacies shall be free of duty.”

By clause 10 she gave her residuary estate to her trustees upon trust for sale and conversion, and directed them, after payment (inter alia) of her legacies “and the duty on all gifts bequests and legacies bequeathed free of duty,” to hold the net proceeds upon trust for two residuary legatees.

The testatrix died on October 9, 1915, i.e., more than a year after settlement estate duty and the relief thereby conferred had been abolished by the Finance Act, 1914, s. 14.

The life tenant of the settled legacy died on July 27, 1916, after the legacy had been set aside but before the estate was distributed:—

*Held*, that not only the settled legacy itself but the successive beneficial interests therein were “gifts bequests or legacies” within clause 9, and consequently the estate duty payable on the cesser of the life interest fell on residue.

*In re Kennedy*, ante, p. 9 and *In re Hatch* [1916] W. N. 240 applied.

*In re D'Oyly*, ante, p. 556 distinguished.

#### ORIGINATING SUMMONS.

By her will, dated August 31, 1910, a testatrix provided (inter alia) as follows:—

By clause 3 she appointed her nephews Alexander and Eliot her executors and trustees and gave 100*l.* to each of them proving.

By clauses 4, 5, and 6 she gave certain specific legacies, and by clause 7 she gave certain pecuniary legacies.

By clause 8 she gave 8000*l.* to the trustees upon trust to pay the income to her brother William for life, and after his death to stand possessed thereof upon trust to divide the same into four

equal shares and to hold one share in trust for her brother Richard, ASTBURY J. one share in trust for her sister Anna, one share in trust for her nephew Alexander, and the remaining share in trust for her niece Gwendolen.

By clause 9 the testatrix declared that "all the foregoing gifts bequests and legacies shall be free of duty."

By clause 10 the testatrix gave her residuary real and personal estate to the trustees upon trust for sale and conversion, and directed them, after payment of her debts, funeral and testamentary expenses, and the legacies left by her will or any codicil, "and the duty on all gifts bequests and legacies bequeathed free of duty," to hold the net proceeds upon trust for two of her sisters-in-law in equal shares.

The testatrix died on October 9, 1915, i.e., more than a year after settlement estate duty and the relief thereby conferred had been abolished by the Finance Act, 1914, s. 14. Her will was proved by Eliot alone, but Alexander, to whom power of proving was reserved, acted as joint trustee with him.

The funeral and testamentary expenses and debts and all death duties payable on the testatrix's death (except legacy duty on residue) were paid. The pecuniary legacies and the duty thereon were paid. The 8000*l.* settled legacy was set aside and the legacy duty paid at once as the successive beneficiaries were liable to the same rate.

The life tenant of the settled legacy died on July 27, 1916, and 40*l.* estate duty became payable on the cesser of his life interest: Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (b). The question arose whether this sum ought to be paid out of the settled legacy or out of residue.

On February 1, 1917, the trustees, who had still sufficient residue in hand to pay this sum as well as the legacy duty on residue, issued this summons to determine the point.

*J. K. Young*, for the trustees.

*Harman*, for the residuary legatees. The point depends entirely on the construction of the particular will: *In re Palmer* (1), in which case, as in *In re Gunn* (2), the duty was thrown on the settled legacy.

(1) [1916] 2 Ch. 391, 398.

(2) [1916] W. N. 283.

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EVE,  
*In re*.  
HALL  
*v.*  
EVE.



ASTBURY J. In the present case clause 9, which contains no reference to the  
 1917  
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 EVE,
In re.
 HALL
 v.
 EVE.
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beneficial interests in the settled legacy, is amply satisfied by applying it to the gift of that legacy to the trustees. This construction is aided by clause 10, which points to a distribution of residue as soon as (inter alia) the legacies and the duties thereon are paid. That must refer to duties payable or, as in the case of future legacy duty, commutable at the testatrix's death.

The present case is virtually governed by *In re D'Oyly*. (1) In that case the testatrix made her will on September 14, 1911. After giving several pecuniary legacies and directing "that all the above legacies shall be paid free of duty and that the duties thereon shall be paid out of my residuary estate," she gave her trustees 7000l. "free of duty" upon trust for a husband and wife (strangers in blood) successively for life, with remainder to a contingent class of their children and issue, and on failure of that class to fall into residue. The testatrix gave her residue "after payment of my just debts funeral and testamentary expenses and the duties on the hereinbefore mentioned legacies and bequests thereout" to a residuary legatee (stranger in blood) absolutely. The testatrix died in December, 1914. The 7000l. was set aside and the legacy duty thereon paid. The question was whether the estate duty which would become payable on the deaths of the life tenants would be payable out of the settled legacy or residue. In the course of the argument Neville J. said it would be dangerous to construe the words "free of duty" by the residuary gift, which in his opinion was in that case purely referential, but he decided that the words "free of duty" were satisfied by applying them to the gift to the trustees, and meant no more than that. The same reasoning applies to clause 9, and the same construction should be adopted.

Again, the executors were prima facie accountable for the legacy duty: Legacy Duty Act, 1796 (36 Geo. 3, c. 52), ss. 12, 13; and even if it had been at different rates they could have commuted it, the rates being known in advance. But they were never accountable for the estate duty arising on the cesser of a life interest under the settled legacy and not arising in respect of property passing on the testatrix's death. The trustees alone were accountable for that: Finance Act, 1894, s. 1; s. 2, sub-s. 1 (b); s. 6, sub-s. 2;

(1) *Ante*, p. 556.

s. 8, sub-ss. 3, 4; s. 9. Is it conceivable that the testatrix ASTBURY J. intended the executors to provide for this future duty? The rate was unknown as it depended on the life tenant's estate, and it would have been practically impossible to commute it. The rates may be increased, and if executors have to provide for future estate duty under such a clause as this the effect in many cases will be to postpone the distribution of the estate during a succession of young lives, and possibly more than half a century. This cannot have been the intention of clause 9, which is amply satisfied by applying it to the gift of the legacy, as in *In re D'Oyly*. (1)

*H. T. Methold* (vice *P. M. Walters*, serving with His Majesty's Forces), for the beneficiaries of the settled legacy. The testatrix died after the Finance Act, 1914, was in force, so that prima facie this estate duty, from which there was no longer any relief, was included in clause 9: *In re Snape*. (2) In *In re Palmer* (3) the settled legacy was to be "handed over or paid" to the trustees, and in *In re Gunn* (4) the context indicated an immediate division of the residue. In *In re D'Oyly* (1) there was merely a gift of the settled legacy "free of duty," and Neville J. thought the words were satisfied by applying them to the gift. In the present case there is a separate clause 9 declaring that all the foregoing "gifts bequests and legacies" shall be free of duty. The residuary legatees give no force to those three words, treating them as a redundant expression for "legacies." But the word "bequests" clearly includes the beneficial interests in the settled legacy: *In re Kennedy*. (5) The case therefore falls within *In re Hatch* (6), *In re Stoddart* (7), and *In re Tinkler* (8), and the duty is thrown on residue.

*Harman*, in reply. The suggestion of Eve J. in *In re Snape* (2) that a gift "free of all duty" would include duties imposed or set free between the will and the death is only a dictum, and, having regard to *In re Palmer* (9), it may be disregarded. In *In re Hatch* (6), *In re Stoddart* (7), and *In re Tinkler* (8) there were special words pointing to the beneficial interests in the settled legacy. There is

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*In re*.  
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(1) *Ante*, p. 556.

(2) [1915] 2 Ch. 179, 184.

(3) [1916] 2 Ch. 391, 398.

(4) [1916] W. N. 283.

(5) *Ante*, p. 9.

(6) [1916] W. N. 240.

(7) [1916] 2 Ch. 444.

(8) *Ante*, p. 242.

(9) [1916] 2 Ch. 391, 397.

ASTBURY J. nothing of that sort here. *In re Kennedy* (1) was confined to the payment of legacy duty, which I do not dispute. It did not touch the question of future estate duty, which is in an entirely different category.

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EVE,  
*In re.*  
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 v.  
EVE.

ASTBURY J. (after stating the facts). The effect of giving a settled legacy free of duty so far as regards the estate duty, the relief from which is abolished by the Finance Act, 1914, has been the subject of a considerable number of decisions. In many of these decisions the question turned on the inquiry whether the testator could possibly have intended to provide for future imposed duties, i.e., duties imposed either after his will, or still more after his death. In the present case the testatrix died more than a year after the Finance Act, 1914, came into operation.

In *In re Palmer* (2), where the testator died in 1913, Lord Cozens-Hardy M.R. said: "There is no general principle which can be relied upon. A testator may use language which is sufficient to cover a duty not in force at his death. . . . His intention must be found from the language of the will." In that case the direction that the legacies were to be "handed over or paid" free of all duties enabled the Court to hold that the date of payment or handing over was the critical date, and when once the executors had paid duties exigible at that date the direction was satisfied, and that duties imposed after that date were payable out of the settled legacy, and not out of residue. In that case also the decision of Eve J. in *In re Snape* (3), which had the merit of convenience, was dissented from.

Since then there have been many decisions in which, on the construction of the particular will, the estate duty on settled legacies given free of duty has been thrown on residue.

In *In re Hatch* (4) the testator, who died in 1907, after giving settled legacies, directed that all legacy, annuity, succession, or other duties "payable in respect of all and every the benefits given by this my will" should be paid out of residue. Sargant J. held, and it is difficult to see how he could have come to any other conclusion, that the successive interests in the settled legacies were

(1) *Ante*, p. 9.

(2) [1916] 2 Ch. 391, 398.

(3) [1915] 2 Ch. 179, 184.

(4) [1916] W. N. 240.

benefits and that all duties in respect thereof must be borne by ASTBURY J. residue.

In *In re Stoddart* (1) the testator, who died in 1913, gave settled legacies and directed "all the legacies (whether settled or otherwise) . . . to be paid and enjoyed free of all death duties." Sargant J. applied the rule in *In re Palmer* (2) and held, on the construction of the particular will, that the estate duty that would become payable on the cesser of the life tenancies must be borne by residue.

The principal point relied on by the persons interested in the settled legacy here is that the successive interests in that legacy are gifts, bequests, or legacies within clause 9 and therefore free of duty. If that is the true construction of clause 9 the case falls within *In re Hatch*. (3)

The residuary legatees, on the other hand, contend that clause 9 merely refers to the gift of the 8000*l.*, and not to the successive beneficial interests therein. They rely on *In re D'Oyly*. (4) In that case the testatrix by her will, dated September 14, 1911, gave her trustees 7000*l.* "free of duty" upon trust for a husband and wife successively for life, with remainder to their children and issue as therein provided. The testatrix died in December, 1914, i.e., as in the present case, after the Finance Act, 1914, had come into operation, and the question was whether the words "free of duty" were enough to throw on residue the estate duties that would become payable on the deaths of the life tenants. I have been furnished with a transcript of Neville J.'s judgment. (5) He said: "What does a testator mean by giving a legacy 'free of duty?' One must assume that the testator is speaking at the time of his death with a knowledge of the legal result of the words he uses, to this extent, that he is supposed to know the statutory obligations attaching upon the estate he leaves. If he gives 1000*l.* 'free of duty' he means the legatee to be paid 1000*l.* . . . Does he mean more than that? Does he mean that the legacy is to be protected and indemnified against any obligation now existing or hereafter to be imposed on persons in enjoyment of the legacy?

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 EVE,  
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 EVE.

(1) [1916] 2 Ch. 444.

(2) [1916] 2 Ch. 391, 398.

(3) [1916] W. N. 240.

(4) Ante, p. 556.

(5) [From shorthand notes:  
 see the judgment as revised at  
 p. 559, ante.]



ASTBURY J. In the case of a direct legacy the point does not arise ; but in the  
 1917 case of a settled legacy, which the testator anticipates will be enjoyed  
 EVE, by various persons in succession, the point arises that on the life  
*In re.* tenant's death estate duty has to be paid before the remainderman  
 HALL can enjoy the succession. Does the testator mean to provide that  
*v.* duty out of residue under the words ' free of duty ' ? I do not think  
 EVE. so. It seems to me that when the legatee or legatees, be they one  
 or several, entitled in succession receive or have paid to or appropriated by their trustees the sum of 7000*l.* free from any deduction, they have all the benefit the testator intended . . . and no further imposts payable at a future time, or under any future legislation, create any claim against the residue. The result of interpreting the words ' free of duty ' to cover all future duties existing or non-existing, though not to be considered in construing the particular words of the will, would in an enormous number of cases practically prevent the distribution of the estate for an unknown period, as the amount required to satisfy those duties is unknown and unascertainable, and I think one would want words at all events indicative that, notwithstanding this remarkable result, the testator in fact intended the legatee to be protected from all future payments before putting such an interpretation upon them. In the present case they are amply satisfied by saying they involve payment of the legacy to the trustees without reduction, and involve no more."

If, therefore, on the construction of clause 9 I could hold that it merely applied to the gift of the 8000*l.* and not to the successive beneficial interests therein, I should follow *In re D'Oyly*. (1) But if it applies to the beneficial interests, the case falls within *In re Hatch*. (2)

Now in *In re Kennedy* (3) the Court of Appeal held that a clause directing all the legacies, annuities, and " bequests " to be given and paid " free of all death duties " applied to a life interest in the residue, the whole of which residue was subsequently given subject to the payment of these duties.

Although the decision on one will does not necessarily bear on another will, I think the principle of this decision does affect the construction of clause 9. The 8000*l.* is given to the trustees, on

(1) Ante, p. 556.

(2) [1916] W. N. 240.

(3) Ante, p. 9.

trust for certain persons in succession, and in the face of *In re ASTBURY J. Kennedy* (1) I cannot say that these successive interests are not gifts, bequests, or legacies within clause 9.

I am not entirely satisfied as to what the testatrix intended by clause 9. She possibly referred to the gifts, bequests, and legacies in clauses 3 to 8, treating the 8000*l.* as one of them. But the clause is ambiguous, and, in the absence of further light as to its meaning, I am unable to hold that the words "foregoing gifts bequests and legacies" do not also apply to the successive beneficial interests in the settled legacy.

The case therefore falls within *In re Hatch* (2) and not within *In re D'Oyly* (3), and the residue must bear the estate duty.

Solicitors: *Murray, Hutchins, Stirling & Co.*

G. R. A.

*In re HOBBS.*

HOBBS *v.* HOBBS.

[1914 H. 1746.]

C. A.

1916

SARGANT J.

Dec. 4, 5, 21.

*Will—Construction—Rule in Shelley's Case—Equitable Life Estate followed by Gift to Lawful Issue Male in Succession of Tenant for Life—Devise to Issue treated as merely introductory to Subsequent Limitations.*

C. A.

1917

March 12, 13,  
14.

Testator, who died in 1873, by his will appointed three trustees, and devised and bequeathed to them, their heirs, executors, administrators, and assigns, all his real and leasehold estate "upon trust to receive for or permit my son W. to receive the rents, issues and profits during his life of " two specified freehold hereditaments, he keeping the same in repair and paying the expenses of insuring the same against fire, and the taxes and other outgoings affecting the same. Then followed a proviso that if W. should do or suffer anything to deprive himself of the personal enjoyment of any of the rents, &c., the trust thereinbefore declared should "immediately cease and determine," and the rents, &c., should be received by the trustees during the then residue of W.'s life, "and be applied

(1) Ante, p. 9.

(2) [1916] W. N. 240.

(3) Ante, p. 556.

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1916  
HOBBS,  
*In re.*  
HOBBS  
*v.*  
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to and for the support and maintenance or use and benefit of the lawful issue for the time being (if any) of W." as therein provided ; but, if W. should have no issue then living, testator empowered his trustees to apply the income as far as possible to secure its application for W.'s personal enjoyment and prevent the same "from becoming the property of his alienees or creditors " ; but if in certain circumstances (which did not happen) W. should be absent from England, testator directed his trustees until his return and afterwards to pay a weekly sum to X. and to invest and accumulate the rest of this income. Next followed a trust to "permit" testator's wife "to receive the rents, issues and profits during her life" of other freehold properties and some leasehold houses, and a trust to sell as soon as convenient after testator's decease some other leasehold properties and also (after his wife's death) the leaseholds given to his wife for life, and to pay the proceeds of one of the other leaseholds (not given to her) to his wife. Then testator declared that if W. should not be in England at the time of testator's death (an absence which did not occur), but should return within ten years, he was to have the surplus income of the property in which a life interest had been given to him and of the accumulation thereof after paying the weekly sum ; but if W. should not have returned within the ten years testator directed his trustees to pay the surplus income and investments thereof to J. W., and "to permit and empower" him to receive the rents, &c., for his own life of the two freeholds given in trust for W. for life, subject to an annuity of 50*l.* to X. in lieu of the weekly sum. Then testator said that on W.'s death, if (as happened) he should have returned, he devised the same two freeholds "unto the lawful issue male in succession of the said W., so that every elder son and his issue may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male ; and, on failure of such issue, to the said J. W. and his issue male," charged with the annuity to X., "for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of the said W.," and, on the failure of such issue as aforesaid of W. and J. W., testator gave the lastly referred to hereditaments unto J. H., a nephew of the testator, "for his life, with remainder to his issue male, for the same estates and in the same order as the said hereditaments are hereinbefore limited to the first and every subsequent son of the said W." Then, if W. was present in England (as he was), testator in that event, on the decease of testator's wife, gave the freeholds in which she had a life interest, charged with the 50*l.* annuity, "unto the said W. for his life, but subject to the provisoes and conditions aforesaid, and, subject thereto, I devise the whole of the said last-mentioned freehold . . . . premises to the same persons, in the same order, and in like manner

as I have hereinbefore devised my other freehold estate." Testator's widow died in 1878. W. died in 1905, without having had male issue. J. W. died in 1908, without having had male issue. J. H. died in 1906, having had four sons (all born in testator's lifetime), J. E., Y. H., W. G., and S. S. died leaving a son J. S. J. E. died without issue in 1913, and Y. H. died in 1916, without male issue:—

*Held*, by Sargant J. and the Court of Appeal—(1.) that, applying the doctrine of *cy près* or approximation, the devises to W. and his male issue and to J. W. and his male issue were not void for remoteness (see *Humberston v. Humberston* (1716) 1 P. Wms. 332, and *Vanderplank v. King* (1843) 3 Hare, 1); (2.) that if W. did not take an immediate estate in tail male under the rule in *Shelley's Case* (1581) 1 Rep. 93b, there was not to be implied, in priority to the devise to J. W. and his issue, an estate in tail male in remainder to W., and that, similarly, there was not to be implied, in priority to the devise to J. H. and his issue, an estate in tail male in remainder to J. W. (*Forsbrook v. Forsbrook* (1867) L. R. 3 Ch. 93, *Neville v. Thacker* (1888) 23 L. R. Ir. 344, and *Doe v. Gallini* (1833) 5 B. & Ad. 621 distinguished); (3.) that, the life estate of W. being only equitable, and the devise to his descendants being a legal devise, W. did not take an estate tail, and that the same ruling applied in the case of the devises to J. W. and his descendants; and (4.) that, in the result, J. W. became, on the death of W. without male issue, entitled to an estate for life only, and that on the death of J. E. without male issue Y. H. became entitled to an estate for life, and that on the death of Y. H. without male issue the property stood limited to the use of W. G. for life, with remainder to his first and other sons successively in tail male, with remainder to J. S. in tail male, with remainders over.

*Held*, also, by Sargant J. that, assuming W.'s life estate was a legal estate and the devise in remainder to his descendants was capable of giving W. an estate in tail male, the rule in *Shelley's Case* did not apply so as to execute the estate in W., but that the limitations to his descendants were limitations to his sons and grandsons by way of purchase, and so as to execute in them successive estates for life and in tail male, and that the same ruling applied in the case of the devises to J. W. and his descendants (*In re Keane's Estate* [1903] 1 I. R. 215 disapproved, and *In re Simcoe* [1913] 1 Ch. 552 distinguished).

#### ADJOURNED SUMMONS.

James Hobbs, below called "the testator," made a will, dated November 7, 1868, which, so far as it is material to this report, was as follows:

"I appoint my brother Job Hobbs, my wife Amelia Hobbs, and my nephew Joseph William Hobbs, the son of my brother William Hobbs, to be trustees and executors of this my will."

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After a disposition of all the testator's personal property except leaseholds the will proceeded as follows :

" I devise and bequeath to the said Job Hobbs, Amelia Hobbs, and Joseph William Hobbs, their heirs, executors, administrators and assigns, all my real and leasehold estate, upon trust to receive for or permit my son William Hobbs to receive the rents, issues and profits during his life of my freehold messuage and premises used as a public-house and known by the sign of the King's Arms in Hoxton Old Town, in the county of Middlesex, and also of all my ten messuages and premises known as Hobbs' Crescent, situate in Constable's Alley, Hoxton Old Town, aforesaid, he my said son William Hobbs keeping the said several freehold messuages or tenements in repair, and paying the expenses of insuring the same from loss or damage by fire, and all the taxes and other outgoings affecting the same. Provided always, and I hereby declare, that if the said William Hobbs shall alienate, charge, incumber, or dispose of the said rents, issues and profits or any part of the income to be derived from the said freehold messuages and tenements, or his interest therein, or attempt so to do, or if by reason of his bankruptcy or insolvency or by any other means the said rents, issues and profits can no longer be personally enjoyed by my son the said William Hobbs, then the trust hereinbefore expressed concerning the same shall immediately cease and determine and the said rents, issues and profits shall be received by my said trustees during all the then residue of the life of my son the said William Hobbs, and be applied to and for the support and maintenance or otherwise for the use and benefit of the lawful issue for the time being (if any) of my son the said William Hobbs in such manner as the said William Hobbs may direct, and in default thereof amongst them as my said trustees, or the survivors or survivor of them, shall think proper ; but if my said son William Hobbs shall have no lawful issue then living, I authorize and empower the said trustees, or the survivors or survivor of them, to pay and apply the aforesaid income in such manner as may as far as possible secure to my son the said William Hobbs the personal enjoyment thereof and prevent the same becoming the property of his alienees or creditors ; but, in case my said son William Hobbs should not to the knowledge of my said trustees be in England at the time of my decease, or return thereto

within ten years thereafter and continue to reside therein, then I direct my said trustees, forthwith and until my son William Hobbs shall return to England, out of the aforesaid income to pay and apply five shillings weekly for the maintenance of Elizabeth Winifred Hobbs, daughter of my son James Hobbs deceased, until she shall attain the age of twenty-one years, and thereafter to pay out of the said income five shillings weekly to the said Elizabeth Winifred Hobbs for her separate use, independently of any husband with whom she may intermarry and without any power of anticipation, and to invest the residue of such income and also any accumulations of interest or dividends thereon in their names in the Government or Parliamentary stocks of Great Britain or other real securities in England or Wales : And also upon trust to permit my said wife to receive the rents, issues and profits during her life for her absolute use and benefit of my freehold messuages and premises numbered 15, Hyde's Place, Hoxton, aforesaid, and No. 15, Victoria Place, in Hoxton aforesaid, the latter of which adjoins or is near to the said freehold messuage known by the sign of the King's Arms and is used as a baker's shop, and also of my two freehold messuages or tenements, with the coach-house and premises adjoining thereto, called and known as Amelia Villas, Southgate, in the county of Middlesex, and also of my ten leasehold messuages or tenements and premises numbered respectively 1 to 10, Poole Street, New North Road, Hoxton aforesaid, but subject, as to all the said messuages and tenements and premises, to my said wife keeping the same in repair and paying the expense of insuring them from loss or damage by fire, and also to the taxes and other outgoings affecting the same, and subject also, as to the said last mentioned leasehold messuages, or tenements and premises, to the ground rent payable in respect thereof, and also, in case and when my said son William Hobbs shall return within the said term of ten years to or be resident in England, to the payment thereafter, out of the said leasehold messuages, of the said five shillings weekly to or for the said Elizabeth Winifred Hobbs during the lifetime of my said wife : And also upon trust to sell and absolutely dispose of, as soon as convenient after my decease, all that my leasehold messuage or tenement and premises numbered 7, Felton Terrace, in Hoxton aforesaid, and all those my two leasehold messuages or tenements and premises, and

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the land adjoining thereto, situate in Love Lane, Tottenham, in the county of Middlesex, and also, after the decease of my said wife, all those the said ten leasehold messuages . . . . in Poole Street aforesaid, and to pay over the proceeds " of " sale of the said two leasehold messuages . . . . and the land adjoining thereto situate in Love Lane aforesaid to my said wife for her absolute use and benefit, and to stand possessed of the other moneys to arise from such sale or sales, in trust, after payment of the expenses thereof, to pay out of the first of such moneys that may be received " 100*l.* to one George Stockwell, if alive at testator's death, and if then dead to testator's wife.

The will then continued as follows : " And I will and declare that, if my said son William Hobbs shall not be in England at the time of my decease but shall afterwards and before the expiration of ten years from that time return to and continue to reside therein, he shall have so much of the income of the said property in which I have given him a life interest as aforesaid, and the stocks, funds and securities wherein the same may have been invested, and any accumulation thereof as shall not have been applied in making the aforesaid weekly payment, but, if the said William Hobbs shall not have returned to England within such ten years as aforesaid and continued to reside therein, then I direct my said trustees to pay over or transfer such surplus income, and the stocks, funds and securities wherein the same or any part thereof may have been invested, to the said Joseph William Hobbs. And, if my said son William Hobbs shall not have returned within the said ten years to and continued to reside in England, then I direct my said trustees to permit and empower the said Joseph William Hobbs to receive the rents, issues and profits, for his own life and for his own use and benefit, of the said freehold messuage and premises " called " the King's Arms and of the said ten messuages and premises known as Hobbs' Crescent, subject to the payment of 50*l.* per annum in lieu of the said five shillings weekly to the said Elizabeth Winifred Hobbs during her life for her separate use and without any power of anticipation, and also subject to the same provisions and conditions as hereinbefore mentioned with respect to the said William Hobbs."

The will then went on as follows : " And, upon the decease of the said William Hobbs, if he shall be in England at the time of my

decease or have returned thereto within such ten years as aforesaid and continued to reside therein, I devise and bequeath the said freehold messuage and premises used as a public-house and known as the King's Arms, and the said ten freehold messuages and premises known as Hobbs' Crescent, unto the lawful issue male in succession of the said William Hobbs, so that every elder son and his issue may be preferred to every youngson and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. And, on failure of such issue, to the said Joseph William Hobbs and his issue male, charged with the said annuity to or in favour of and to be paid to the said Elizabeth Winifred Hobbs during her life, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs, or, if the said William Hobbs shall not have been in England within the said ten years and continued to reside therein, then, after the decease of the said Joseph William Hobbs, I devise the said lastly referred to hereditaments to his issue in like manner as on the failure of issue of the said William Hobbs. And, on the failure of such issue as aforesaid of the said William Hobbs and Joseph William Hobbs, then I bequeath the said lastly referred to hereditaments unto James Hobbs, son of the said Job Hobbs, for his life, with remainder to his issue male, for the same estates and in the same order as the said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs; and, if he the said William Hobbs shall have been in England within the said ten years and continued to reside therein, then, upon the decease of my said wife, I also devise and bequeath the said freehold messuages and premises No. 15, Hyde's Place aforesaid, and No. 15, Victoria Place aforesaid, and the said freehold messuages with coach-house and premises known as Amelia Villas, Southgate, charged with the payment of the said annuity of 50*l.* to the said Elizabeth Winifred Hobbs in manner aforesaid, unto the said William Hobbs for his life, but subject to the provisoes and conditions aforesaid; and subject thereto I devise the whole of the said last mentioned freehold messuages or tenements and premises to the same persons, in the same order, and in like manner, as I have hereinbefore devised my other freehold estate."

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The testator died on February 24, 1873, and his will was proved by his three executors, namely, his brother Job Hobbs, his wife, Amelia Hobbs, and his nephew Joseph William Hobbs.

William Hobbs, the son of the testator, was in England at the time of the testator's death and continued to reside there, and he was the only surviving child of the testator.

Amelia Hobbs, widow of the testator, died in January, 1878, and Job Hobbs, his brother, died in April, 1878, having appointed Joseph William Hobbs his executor.

By an order dated September 5, 1884, Joseph William Hobbs and Thomas W. Franklin were, as regarded the freehold estates of the testator at Hoxton, appointed trustees under the settlement created by the will of the testator for the purposes of the Settled Land Acts, 1882 to 1884; and in the same year they sold the King's Arms Inn, No. 15, Victoria Place, and the ten houses forming Hobbs' Crescent.

By a deed dated December 10, 1894, to which Joseph William Hobbs, Franklin, and Henry William Leon Hobbs were parties, the lastly named person was appointed a trustee of the testator's will in the place of Franklin, and it was thereby declared that all the real, leasehold, and personal estate settled by the will should forthwith vest in Joseph William Hobbs and H. W. Leon Hobbs upon the trusts of the will.

James Hobbs, son of Job Hobbs, died in December, 1906, leaving male issue as below stated.

William Hobbs, the son of the testator, died on November 12, 1905, without ever having had male issue and having appointed his wife, Elizabeth Hobbs, who survived him, his executrix.

Job Hobbs, the brother and one of the executors of the testator, had a numerous family. James Hobbs had five sons (all born in the testator's lifetime), the first four of whom, in order of seniority, were James Ebenezer Hobbs, Job Hobbs, William George Hobbs, and Samuel Hobbs.

Samuel Hobbs died before the hearing, and William George Hobbs and James Samuel Hobbs (son of Samuel Hobbs) claimed under the will of James Hobbs as devisees subject to the devise to Job Hobbs.

On February 15, 1906, Joseph William Hobbs, claiming to be tenant in tail under the will of the testator, executed a disentailing

assurance (which was duly enrolled) of the unsold hereditaments and the India stock representing the hereditaments which had been sold; and in 1906 Joseph William Hobbs, as surviving trustee of the testator, applied by originating summons for a declaration that his disentailing deed was valid on the footing that he took an estate in tail male, the defendants to this summons being H. W. Leon Hobbs, Elizabeth Hobbs (widow of William Hobbs, the testator's son), and James Ebenezer Hobbs. This suit was settled on the terms (embodied in an order of Joyce J. dated May 9, 1906) that the disentailing deed was to stand, James Ebenezer Hobbs, for a certain sum, assigning his interest under the will of the testator to Joseph William Hobbs, and Elizabeth Hobbs being allowed to have the use and enjoyment of the two houses at Southgate.

Joseph William Hobbs died on October 22, 1908, without having had any male issue, and having by his will appointed H. W. Leon Hobbs and Sidney Alfred Mitchell his executors and devised the residue of his estate to H. W. Leon Hobbs absolutely; and on this death James Ebenezer Hobbs became entitled to possession if there was not an intestacy and if Joseph William Hobbs' disentailing deed was ineffective.

James Ebenezer Hobbs died without issue on November 10, 1913.

On July 4, 1914, Job Hobbs (grandson of Job Hobbs, the testator's brother) took out an originating summons, the defendants to which were originally H. W. Leon Hobbs and Sidney Alfred Mitchell, raising the question whether under the will of the testator Joseph William Hobbs became, on the death of the testator's son William Hobbs without male issue, entitled to the India stock (of about 5160*l.*) and to the unsold land settled by the will of the testator; and asking for a declaration that on the death of James Ebenezer Hobbs without issue the plaintiff Job Hobbs became entitled to an estate tail in the India stock and the unsold land.

The summons came on for hearing on February 2, 1916, but in the meantime (May, 1915) the defendant H. W. Leon Hobbs had died, and Eleanor Hobbs, Joseph Percy Hobbs, and John Henry Hobbs had in November, 1915, been added as defendants, they and Mitchell being the executors of H. W. Leon Hobbs. At this hearing E. T. Smith, said to be the mortgagee of the interest of Job Hobbs, the plaintiff, was added as a defendant. The summons stood over

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in order that some one should be added to represent the inheritance, and before the addition Job Hobbs, the plaintiff, died without male issue. His executrix, Alice Hobbs, was substituted as plaintiff in his place, and William George Hobbs (his brother), James Samuel Hobbs (his nephew), and Elizabeth Hobbs (widow of William Hobbs, the son of the testator) were added as defendants. Ultimately William George Hobbs was struck out as a defendant and made co-plaintiff with Alice Hobbs. The result as to parties when the summons was heard out was as follows :—

Plaintiffs : Alice Hobbs, executrix of Job Hobbs, junior (the grandson of Job Hobbs, brother of the testator and one of the original trustees of his will), and William George Hobbs.

Defendants : Sidney Alfred Mitchell, surviving executor of Joseph William Hobbs (a devisee under the will of the testator) ; Eleanor Hobbs, Joseph Percy Hobbs, and John Henry Hobbs, executors with Mitchell of H. W. Leon Hobbs (residuary devisee and legatee of Joseph William Hobbs) ; E. T. Smith, mortgagee of the original plaintiff Job Hobbs ; James Samuel Hobbs, a nephew of the plaintiff Job Hobbs and son of Samuel Hobbs, deceased ; and Elizabeth Hobbs, the widow and universal legatee of William Hobbs (the son and heir-at-law of the testator).

The plaintiff William George Hobbs had never had male issue. The only disentailing deed which was executed was that of Joseph William Hobbs.

The summons came on for hearing before Sargant J. on December 4, 1916.

*Woodfin*, for the plaintiffs Alice Hobbs (executrix of Job Hobbs, junior) and William George Hobbs (son of James Hobbs and grandson of Job Hobbs, the testator's brother). Joseph William Hobbs, named in the will, took only an estate for life. On his death in 1908 and the death of James Ebenezer Hobbs in 1913, and the death of Job Hobbs, junior, all without male issue, the property stood limited to the use of William George Hobbs for life in possession, with remainder to his first and other sons successively in tail male.

*Maugham, K.C.*, and *Swords*, for the defendant James Samuel Hobbs (son of Samuel Hobbs). William Hobbs did not under the

rule in *Shelley's Case* (1) become entitled to an estate tail, inasmuch as the estates given to him and his issue are not either both legal or both equitable, and in such a case the rule does not apply : Jarman on Wills, 6th ed. p. 1861. William took an equitable estate for life : *In re Lashmar* (2) ; Hawkins on Wills, 2nd ed. p. 175. The gift to his issue is legal, and if he had left a son, the son would have taken as purchaser, and, under the *cy près* doctrine, an estate in tail male. On William's death without issue, Joseph William Hobbs took under the referential provisions only an estate for life, with remainder to his issue in tail male, again as purchasers. On the death of Joseph William without male issue, the devise to James Hobbs (who was then dead) for his life, with remainder to his issue male, has to be considered. He had four sons, James Ebenezer, Job Hobbs, junior, William George, and Samuel. James Ebenezer and Job, junior, having died without male issue, William George took an estate for life, with remainder to his issue in tail male. Samuel, however, left a son, James Samuel, who under the *cy près* doctrine takes an estate in tail male, subject to William George dying without leaving issue male. The *cy près* doctrine as to turning a limitation to unborn descendants, which would otherwise be void as a perpetuity, into an estate tail is sufficiently stated in Jarman on Wills, 6th ed. p. 288. *In re Keane's Estate* (3) and *In re Simcoe* (4) are not in point. The word "issue" is not very different in effect, as regards the rule in *Shelley's Case* (1), from the words "heirs of the body" : *Roddy v. Fitzgerald* (5) ; Hawkins on Wills, 2nd ed. p. 233. Assuming that William Hobbs' life estate was a legal limitation, then, although the rule in *Shelley's Case* (1) is a rule of law, it may be shown that the testator was using the term "issue" in a restricted and not in its strict legal sense : Fearne on Contingent Remainders, 10th ed. vol. 1, pp. 151, 196, 198 ; *Goodtitle v. Herring* (6) ; *Van Grutten v. Foxwell*. (7) Here the context shows that "issue" is used in the narrow sense of "sons" and "grandsons." Where there is a devise to the children of A. as a class, A.'s children who are born in the testator's lifetime may take estates for life, and the limitation to

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(1) 1 Rep. 93b.

(4) [1913] 1 Ch. 552.

(2) [1891] 1 Ch. 258.

(5) (1858) 6 H. L. C. 823.

(3) [1903] 1 I. R. 215.

(6) (1801) 1 East, 264.

(7) [1897] A. C. 658, 663.



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children of the unborn children may alone have to be altered by converting it cy près into an estate tail to the unborn children of A.: *Vanderplank v. King*. (1) The present case is governed by *In re Lord Lawrence*. (2) [They also referred to *Jesson v. Wright*. (3)]  
*J. S. Green*, for the defendant Elizabeth Hobbs, the widow and executrix of William Hobbs.

*Clayton, K.C.*, and *T. T. Methold*, for the other defendants.  
First: Apart from the rule in *Shelley's Case* (4) and the cy près doctrine, if the limitation to William Hobbs and his issue is read literally, he takes a life estate, and then there are limitations to the unborn sons of an unborn person which are void for remoteness. Therefore on the death of William Hobbs the estate is undisposed of.

Secondly: William Hobbs took a legal estate for life: *Doe v. Biggs* (5); *Baker v. White*. (6) The gift to William's issue being also legal, he took an estate in tail male: *In re Keane's Estate* (7); *In re Simcoe*. (8) Although *Goodtitle v. Herring* (9) seems not to have been cited in *In re Keane's Estate* (7), *Lowe v. Davies* (10), on which the decision in *Goodtitle v. Herring* (9) was based, was cited. In *Goodtitle v. Herring* (9) the words were "the elder of such sons," and in Jarman on Wills, 6th ed. p. 1900, some importance appears to be attached to the word "such." The decision in *Goodtitle v. Herring* (9) is the high-water mark of decisions that the rule in *Shelley's Case* (4) is not applicable. On William Hobbs' death without issue Joseph William Hobbs took an estate in tail male, and he acquired an estate in fee simple by disentailing. [They also referred on this point to *Poole v. Poole*. (11)]

Thirdly: If William Hobbs' sons were to take by purchase, he took a life estate, with remainder to his sons for life, with remainder to himself in tail male, and Joseph William Hobbs and his sons took similar estates: *Forsbrook v. Forsbrook* (12); *Hampton v. Holman* (13); *Neville v. Thacker*. (14) There were three stirpes—

(1) 3 Hare, 1.

(2) [1915] 1 Ch. 129.

(3) (1820) 2 Bli. 1.

(4) 1 Rep. 93b.

(5) (1809) 2 Taunt. 108.

(6) (1875) L. R. 20 Eq. 166. \*

(7) [1903] 1 I. R. 215.

(8) [1913] 1 Ch. 552.

(9) 1 East, 264.

(10) (1729) 2 Ld. Raym. 1561.

(11) (1804) 3 Bos. & P. 620, 627.

(12) L. R. 3 Ch. 93.

(13) (1877) 5 Ch. D. 183.

(14) 23 L. R. Ir. 344.

William, Joseph William, and James—and prima facie the testator meant that each stirps should be treated as on the same footing. William took an estate tail under the cy près doctrine, and the gap occurs in the omission of an express life estate to Joseph William: *Doe v. Gallini*. (1) [They also referred to 3 Comyns' Digest, p. 398.]

*Swords* in reply referred to *Harton v. Harton* (2), *Hawkins v. Luscombe* (3), and *Brown v. Whiteway*. (4)

*Cur. adv. vult.*

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1916. Dec. 21. SARGANT J. The original plaintiff in this case, though asking for a general declaration as to the construction of the will of the testator, James Hobbs, deceased, was doing so merely as one step towards recovering certain freehold property, No. 15, Hyde's Place, Hoxton (otherwise known as No. 29, Hyde Road), and two houses called Amelia Villas, Southgate, and also towards recovering the investments representing the purchase-money of certain other freeholds at Hoxton Old Town, namely, a public-house called the King's Arms, ten messuages known as Hobbs' Crescent, and a messuage called No. 15, Victoria Place, which have been sold under the provisions of the Settled Land Acts; and this is also the present position of the present plaintiff, Alice Hobbs, who is the executrix of Job Hobbs, and of the new parties William George Hobbs and James Samuel Hobbs, who claim under the will of James Hobbs as devisees subsequent to the devise to Job Hobbs. There has, however, been a slight alteration in the position between the two hearings by the sale of No. 15, Hyde's Place or 29, Hyde Road for a sum of 300*l.* or thereabouts. As regards this property, the plaintiffs' claim is transferred from the property itself to the purchase-money.

The first defendant, who died between the issue of the summons and its first hearing, was the surviving trustee of the will of the original testator, James Hobbs, and executor with the second defendant, Sidney Alfred Mitchell, of the will of one Joseph William Hobbs, one of the devisees under the will of the testator. And this second defendant and the three next defendants are the executors of the

(1) (1835) 3 Ad. & E. 340. (3) (1818) 2 Swanst. 375.  
(2) (1798) 7 T. R. 652. (4) (1846) 8 Hare, 145.

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will of Henry William Leon Hobbs, the residuary devisee and legatee under the will of Joseph William Hobbs. I understand that the India stock in question is standing in the name of the defendant Sidney Alfred Mitchell, as executor of Joseph William Hobbs, and that the Hoxton freeholds are either in his possession in the same capacity or in the possession of the four executors of Henry William Leon Hobbs.

The case has been twice argued. On the first hearing an objection was taken on behalf of the defendants that the plaintiff had assigned any interest of his under the will by way of mortgage or charge to a Mr. E. T. Smith, a member of the firm of solicitors representing the defendants. It was accordingly arranged at the hearing that this gentleman should be added as a defendant, and his name was then placed on the brief of counsel for the defendants. This was the state of the parties at the first hearing.

Although there might have been some doubt whether under all the circumstances the proceedings could be brought by way of originating summons (see, for instance, *Lewis v. Green* (1)), Mr. Clayton and Mr. Methold, appearing for all the then defendants, waived any technical objections and expressed their willingness that I should decide as between the plaintiff and the defendants the question of the construction of the will. To make this question clear I ought to state that Mr. Clayton's clients rely on two alternative titles under the will of the testator. First and foremost, they say that the will gave their predecessor, Joseph William Hobbs, an estate in tail male which he duly disentailed by indenture dated February 15, 1906. Alternatively, and by way of subsidiary defence, they say that the limitations created by the will, subsequent to certain definite life interests, were void for remoteness, and that the remainder in the properties in question vested in the testator's heir-at-law, his son William Hobbs; and that, by a compromise effected in the year 1906 between Joseph William Hobbs and Elizabeth Hobbs, the widow and devisee of William Hobbs the son, and embodied in an order of Joyce J. dated May 9, 1906, Elizabeth Hobbs confirmed the title of Joseph William Hobbs to some of these properties and to the proceeds of sale of such of them as had been sold. The original plaintiff, on the other hand, who was no party to

the order of May 9, 1906, contended that the will of the testator gave to the testator's nephew Joseph William Hobbs an estate for life only; that the disentailing assurance executed by him was ineffective; and that the beneficial interest in the properties, or the purchase-moneys representing them, had on the failure of all the prior limitations of the will devolved on the plaintiff in possession. The plaintiff also, of course, contended that the limitations of the will had not failed for remoteness, and that the heir-at-law of the testator, his son William Hobbs, did not take, and could not pass to any one else, any estate in the properties as on an intestacy.

When the case was first argued before me counsel for the plaintiff appeared to assume that if the plaintiff took at all he took for an estate of inheritance, and I had no reason to doubt this assumption. But afterwards, when considering my judgment, I noticed that, on the face of a pedigree which was supplied to me, the plaintiff was born in the lifetime of the testator, and that consequently there was no legal objection to a limitation to him for life, with remainder to his first and other sons in tail or tail male. It was therefore necessary, since the plaintiff claimed an immediate estate in tail male in possession, and therefore practically an absolute dominion over the property, to have the interests of his sons and the remaindermen represented. Accordingly I directed that some one should be added to represent the inheritance. While the summons was standing over for this purpose, the plaintiff Job Hobbs died, and it became necessary to make further alterations in the parties on this account, and ultimately Job Hobbs' executrix, Alice Hobbs, has been substituted in his stead as plaintiff, and two further defendants were added. The first of these was William George Hobbs, the brother of Job Hobbs, who would take the same estate (if any) as Job Hobbs, namely, either as tenant for life or as tenant in tail. And the second of these was James Samuel Hobbs, a nephew of Job Hobbs, who would, if Job Hobbs and his brothers took estates for life only, be in the existing circumstances the next person entitled subsequently to William George Hobbs, and would be entitled to an estate in tail male in remainder expectant on the determination of the estate of William George Hobbs whether the estate itself were an estate for life or an estate in tail male. Further, Elizabeth Hobbs, the widow and universal devisee of William Hobbs, the son and heir-

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at-law of the testator, had various interests in the matter, such as (1.) her original claim, apart from the order of May 9, 1906, already mentioned, to take the property as on an intestacy, and (2.) a claim to dower in the event of the will being held to give William Hobbs the son an estate in tail male in the property in question. Accordingly, I directed that she also should be made a defendant to the summons, and this has been done and she has appeared on the second hearing. I think, therefore, that all the various interests are now properly represented. A further difficulty, however, appeared at the second hearing, namely, that counsel for the plaintiff Alice Hobbs attempted also to appear for the defendant William George Hobbs, whose interests were practically identical, or at any rate not in conflict, with those of the plaintiff. It was of course impossible that counsel should appear in this double capacity. But this difficulty was got over by striking out William George Hobbs as a defendant and adding him as a co-plaintiff with Alice Hobbs.

An agreed pedigree which has been supplied to me shows the family or near relatives of the testator at the date of his will and death to have been as follows : He had a wife, Amelia Hobbs, and one surviving child, William Hobbs, who in his turn had a wife, Elizabeth Hobbs, not actually shown on the pedigree. The testator also had a nephew, Joseph William Hobbs, the son of a deceased brother, William Hobbs. And he had also a brother, Job Hobbs, who had a numerous family, of whom the eldest was a son, James Hobbs. This nephew of the testator was also married and had five sons, all of them born in the lifetime of the testator. Of these the eldest was James Ebenezer Hobbs, since deceased ; the second, the original plaintiff Job Hobbs ; the third, the new defendant or co-plaintiff William George Hobbs ; and the fourth, Samuel Charles Hobbs, since deceased, whose eldest son is the new defendant James Samuel Hobbs. I should add that the testator's son William Hobbs appears to have been, or to have been considered by the testator as being, not only of improvident habits, but also of a roving disposition ; and accordingly, not only does the testator provide for the event of William Hobbs' bankruptcy or alienation, but he also makes certain alternative dispositions by his will, the one set being dependent on his son not being in England at the time

of the testator's decease or returning thereto within ten years thereafter and continuing to reside therein (which may be called the alternative of his absence); the other alternative being that of William Hobbs being in England at the time of the testator's decease or returning thereto within ten years and continuing to reside therein (which may be called the alternative of his presence). It is not necessary to consider whether those two alternatives are always strictly kept in view, or whether, as expressed in the will, they were exactly correlative to each other or exhaustive, since it is admitted on all hands that the second alternative was that which occurred, and that this William Hobbs has been dead a good many years without having ever ceased to enjoy the original gift to him. It is merely necessary to give a rough general statement of the two alternatives for the purpose of understanding the general scheme of the will.

By his will, which is dated November 7, 1868, the testator, after appointing his brother Job Hobbs, his wife, Amelia Hobbs, and his nephew Joseph William Hobbs to be trustees and executors thereof, and giving certain specific and pecuniary legacies, devised all his real and leasehold estate to his trustees, their heirs, executors, administrators, and assigns, upon trust to receive for or permit his son William Hobbs to receive the rents, issues, and profits for his life of the King's Arms and the ten messuages known as Hobbs' Crescent, he keeping them in repair and paying the expenses of insurance against fire and all rates, taxes, and other outgoings. And the testator provided that, in case William Hobbs should do or suffer anything to deprive him of the personal enjoyment of any of the said rents, the trust thereinbefore declared should "cease and determine" (I think the exact words are important here), and the said rents should thenceforth be received by his trustees during the residue of William Hobbs' life and be applied for the support, maintenance, or benefit of the issue for the time being (if any) of William Hobbs as therein provided, or if he should have no issue, then so as to secure as far as possible the application of the income for the personal enjoyment of William Hobbs and to prevent the income becoming the property of his alienees or creditors. But in case of William Hobbs' absence the testator directed his trustees to provide out of the aforesaid income 5s. per week for

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Elizabeth Winifred Hobbs, and to accumulate the rest of this income.

The testator then gave his wife Amelia a life interest in No. 15, Hyde's Place, Hoxton, and No. 15, Victoria Place and two freehold villas called Amelia Villas, Southgate, and also in certain leaseholds in Poole Street, Hoxton. The testator then directed his trustees to sell certain other leaseholds at Hoxton and Tottenham on his death, and the leaseholds in Poole Street, Hoxton, on his wife's death, and gave the proceeds to his wife absolutely, less a small legacy to one George Stockwell. The testator then recurred to the property in which he had given his son William Hobbs a life interest, and directed that if his said son should not have been present in England at the time of the testator's death, but should before the expiration of ten years return thereto and continue to reside therein, he should have the income of so much of the said property and the funds wherein the same might have been invested and any accumulation thereof as should not have been applied in making the weekly payment aforesaid; but that in the event of his absence these accumulations were to be paid to the testator's nephew Joseph William Hobbs. And, if the said William Hobbs should not have returned within the said ten years to England and continued to be resident in England, the testator directed his trustees to permit and empower the said Joseph William Hobbs to receive the rents for his own life and for his own use of the King's Arms and the ten messuages known as Hobbs' Crescent, subject to the larger payment of 50*l.* per annum instead of 5*s.* per week to Elizabeth Winifred Hobbs, and also subject to the same provisoes and conditions as thereinbefore mentioned in the case of the testator's son William Hobbs.

The testator then dealt again with the alternative of William Hobbs' presence, and in that event upon the decease of William Hobbs devised and bequeathed the sold Hoxton freeholds in the following terms, namely: "Unto the lawful issue male in succession of the said William Hobbs, so that every elder son and his issue may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male, and, on failure of such issue, to the said

Joseph William Hobbs and his issue male, charged with the said annuity to or in favour of and to be paid to the said Elizabeth Winifred Hobbs during her life, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs."

The testator then, as I read the will, took up the alternative of William Hobbs' absence, and in that event devised the King's Arms and Hobbs' Crescent after the decease of Joseph William Hobbs (the alternative life tenant) as follows, namely, "to his issue in like manner as on the failure of the issue of the said William Hobbs." The testator then, as I read the will, proceeded to deal with the King's Arms and Hobbs' Crescent on either alternative, namely, William Hobbs' presence or William Hobbs' absence. The words are: "And, on the failure of such issue as aforesaid of the said William Hobbs and Joseph William Hobbs, then I bequeath the said lastly referred to hereditaments unto James Hobbs, son of the said Job Hobbs, for his life, with remainder to his issue male, for the same estates and in the same order as the said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs."

The testator then proceeded to deal with the alternative of William Hobbs' presence, and in that event, on the decease of his wife, devised 15, Hyde's Place and 15, Victoria Place and the two houses known as Amelia Villas, Southgate, in the following words: "charged with the payment of the said annuity of 50*l.* to the said Elizabeth Winifred Hobbs in manner aforesaid, unto the said William Hobbs for his life, but subject to the provisoes and conditions aforesaid; and subject thereto I devise the whole of the said last mentioned freehold messuages or tenements and premises to the same persons, in the same order, and in like manner as I have hereinbefore devised my other freehold estate."

It is admitted on all hands that William Hobbs the son was in England at the testator's death and continued there, so that the event which has to be considered is that which I have called the event of William Hobbs' presence. It is also admitted that William Hobbs the son died without ever having had male issue; that Joseph William Hobbs survived him and has since died without ever having had male issue; that James Hobbs the nephew died

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in the lifetime of William Hobbs the son and Joseph William Hobbs the nephew ; that his eldest son James Ebenezer Hobbs survived Joseph William Hobbs, and so became entitled in possession if there was not an intestacy and if Joseph William Hobbs' disentailing deed was ineffective ; that James Ebenezer Hobbs has since died ; and that the original plaintiff was at the date of the issue of the summons the eldest surviving son of James Hobbs the nephew. It is also common ground that Job Hobbs, the original plaintiff, died between the dates of the two hearings without male issue ; that William George Hobbs is the third son of the said James Hobbs and has never had male issue ; that Samuel Charles Hobbs, the fourth son of the said James Hobbs, died many years ago ; and that the defendant James Samuel Hobbs is the eldest or only son of the said Samuel Charles Hobbs. No suggestion is made of the execution of any disentailing assurance other than that executed by Joseph William Hobbs.

I will first deal with the question whether the devises to William Hobbs and his male issue or any subsequent devises prior to that to James Hobbs, son of Job Hobbs, are void for remoteness so as to result in an intestacy. This defence to the plaintiffs' claim was but faintly urged, and it appears to me wholly inadmissible. If the devises to the issue male of William Hobbs are to be construed as comprising successive devises to his unborn sons for life, with remainder to their unborn sons successively in tail male as purchasers, then, although the devises in tail male would on the face of the will infringe the rules against remoteness, it is nevertheless clear that under the well-known doctrine of *cy près* the whole set of devises would be saved and converted into successive estates in tail male in the successive sons of William Hobbs. For this I need only refer to such cases as *Humberston v. Humberston* (1) and *Vanderplank v. King*. (2) And the same remark also applies to the similar estates limited by the subsequent referential devises. At this point, too, I think I should dispose of the suggestion made by Mr. Clayton and Mr. Methold that, even if the will does not give an immediate estate in tail male to William Hobbs under the rule in *Shelley's Case* (3), nevertheless there is to be implied,

(1) 1 P. Wms. 332.

(2) 3 Hare, 1.

(3) 1 Rep. 93b.

in priority to the devise to Joseph William Hobbs and his issue, an estate in tail male in remainder to William Hobbs, and that similarly, in priority to the estates limited to James Hobbs and his issue, there is to be implied an estate in tail male in remainder in Joseph William Hobbs. To support this contention such cases as *Forsbrook v. Forsbrook* (1), *Neville v. Thacker* (2), and *Doe v. Gallini* (3) were either cited or referred to. But in my opinion these cases are quite inapplicable, and merely deal with filling up gaps in limitations, as where, for instance, a gift over is on failure of a larger class of issue than the class to which express gifts have previously been made. In the present case, whatever the construction of the limitations, they are at any rate exhaustive and complete and do not leave any gaps to be filled up or any room for the creation of additional limitations by way of implication.

This brings me to the real question in the case, which is whether the devise in the will in favour of Joseph William Hobbs and his descendants (I purposely use a neutral term here) vested an estate in tail male in Joseph William Hobbs. But, inasmuch as this devise is expressed by reference to a preceding devise or preceding devisees to William Hobbs and his descendants, it becomes necessary in the first instance to make a very careful examination of these devisees, particularly for the purpose of inquiring whether they vested an estate in tail male in William Hobbs.

The devise to the descendants of William Hobbs is clearly a legal devise, and it is of course well established that this could not vest an estate tail in William Hobbs himself if his prior life estate was merely an equitable estate. Accordingly, on the second argument of the case, though not, I think, on the first argument, it was strongly urged on me that on the true construction of the will the trustees took the legal estate in the King's Arms and Hobbs' Crescent during the lifetime of William Hobbs. As against this view it must, I think, be taken as settled law—at any rate in a Court of first instance—that a devise to trustees upon trust to receive for a beneficiary or permit him to receive rents and profits gives him the legal estate, however illogical such a result may be, having regard to the fact that an option appears to be given to the trustees whether to

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(1) L. R. 3 Ch. 93.

(2) 23 L. R. Ir. 344.

(3) 5 B. &amp; Ad. 621.

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receive the rents themselves or not. And in this particular case the faint, though just sufficient, *prima facie* construction is certainly assisted to some extent by the direction that William Hobbs is to keep the property in repair. But on the other hand it is quite clear that, if William Hobbs was not in England at the testator's death, the trustees were to have the legal estate till his return or for ten years. And further, should William Hobbs alienate, it is again obviously necessary that they should have the legal estate during the rest of his life. Now there is but one devise to the trustees during William Hobbs' enjoyment of the property, and no indication of any intended change during that period in the position of the legal estate; indeed, in case of alienation by William Hobbs, the words rather point to cesser of an existing trust and substitution of another trust of the same kind. And accordingly I am on the whole of opinion, though with much hesitation, that on the true construction of this part of the will the determinable estate for life given to William Hobbs was not more than an equitable estate.

The case is, however, so near the line in this respect that I had better also consider the effect of the will on the assumption that William Hobbs' estate for life was a legal estate, and that the devise in remainder to his descendants was consequently capable of vesting a legal estate in tail male in him. Even on this assumption, however, I am of opinion that the rule in *Shelley's Case* (1) does not apply so as to execute the estate in William Hobbs, but that the limitations to his descendants are limitations to his sons and grandsons by way of purchase, and so as to execute in them (apart, of course, from questions of remoteness) the several successive estates for life and in tail male specified in the will.

It is no doubt the case that the rule in *Shelley's Case* (1) is a rule of law, and that when once a devise has been made to the heirs generally, or heirs in tail or tail male of a previous life tenant under the same instrument in the capacity of heirs, they take in the quality of heirs, that is, by descent and not by purchase, and the estate in fee or tail is executed in the *praepositus* notwithstanding any contrary intention on the part of the testator or any subsequent attempt to modify or control the result of the devise. And the same rule applies to a like devise to "the issue" or "issue male" of such a

(1) 1 Rep. 93b.

previous life tenant, though these words are rather more flexible than the words "heirs of the body." But there is nothing in this rule to compel the Court to stop short at any particular point in a devise at which there is sufficient for the purpose of creating an estate tail, and to reject any subsequent part of the devise which tends to explain or interpret, not the result of the devise, but the words which denote the devisee or devisees. Clear examples of the admissibility and effect of such words of interpretation and explanation are to be found in *Lowe v. Davies* (1), *Jones v. Morgan* (2), and *Goodtitle v. Herring*. (3) Further, this principle is clearly recognized in *Van Grutten v. Foxwell* (4) in the speeches of Lord Herschell, Lord Macnaghten, and Lord Davey. And it is very significant in the present case that (quite apart from what seems to me a definition in the devise itself of the sons of William Hobbs and their sons as the persons meant by issue male) there are in the devises following those to William Hobbs and his descendants several distinct references to the "estates limited" to his sons and their sons successively. It seems to me that there is ample here to amount to at least an "explanation" within the cases of the phrase "male issue" as meaning sons and sons of sons. But indeed the later part of the devise itself seems to me to amount to more than a mere explanation of the earlier words. I think that the later words contain the principal and crucial description of the intended devisees, and that the words "the lawful male issue in succession" are rather of the nature of a general introductory description. The case is in this respect very similar to that decided by Astbury J. and the Court of Appeal in *In re Lord Lawrence*. (5)

As against this interpretation I have been much pressed with a contrary decision in the case of *In re Keane's Estate*. (6) There are certain considerations in the present case in favour of the view I have adopted which were not present in *In re Keane's Estate* (6), such as the express subsequent references here to the previous limitations to the first and every subsequent son of William Hobbs. But, laying these differences aside, I am not bound by and I am not

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(1) 2 Ld. Raym. 1561.

(2) (1783) 1 Bro. C. C. 206.

(3) 1 East, 264.

(4) [1897] A. C. 658, 663, 675,  
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(5) [1915] 1 Ch. 129.

(6) [1903] 1 I. R. 215.



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prepared to follow *In re Keane's Estate*. (1) With all respect to the learned judge who decided that case, I do not think that he drew a sufficient distinction between a subsequent explanation of the results of a devise in tail and a subsequent explanation of the meaning of the words used to denote the devisees intended to take. And I think also that he paid too exclusive regard to the presence of the first requisite to the operation of the rule, namely, that the persons named in the later words of that will comprised all the issue male of the praepositus, and omitted to notice the absence of the second requisite to the operation of the rule, namely, that the heirs must take in the character of heirs : see the remarks of Lord Macnaghten in *Van Grutten v. Foxwell* (2) when dealing with the decision of Lord Thurlow in *Jones v. Morgan*. (3) And, further, the decision in *In re Keane's Estate* (1) was before that in *In re Lord Lawrence*. (4)

*In re Simcoe* (5) was also pressed on me, but that case is, in my judgment, clearly distinguishable both from *In re Keane's Estate* (1) and from the present case. The rule in *Shelley's Case* (6) was not really there in question at all. There was but one single initial devise in that case to A. and his issue male, so that the whole estate devised had necessarily to pass through and be executed in A. The subsequent words could not make the issue purchasers consistently with A. being the original taker under the devise. The decision was, if I may say so, clearly and unquestionably right. And had the learned judge who decided that case then given the decision which he subsequently gave as a member of the Court of Appeal in *In re Lord Lawrence* (4), I think he would probably have decided *In re Simcoe* (5) on a shorter ground and one more like that taken in *In re Lord Lawrence*. (4)

Having construed the devise to William Hobbs and his descendants, I have now to construe the referential devise to Joseph William Hobbs and his descendants. But this devise is itself ambiguous and admits of at least two interpretations, both of which I must consider.

In the first place, without any very forced construction, it may be construed as limiting the property to Joseph William Hobbs

(1) [1903] 1 I. R. 215.

(2) [1897] A. C. 658, 676.

(3) 1 Bro. C. C. 206.

(4) [1915] 1 Ch. 129.

(5) [1913] 1 Ch. 552.

(6) 1 Rep. 93b.

for life, and then limiting it to his descendants in a manner analogous to the previous limitations to William Hobbs and his descendants. This construction seems either to involve splitting what is *prima facie* a single devise, namely, that to Joseph William Hobbs and his issue male, into a devise to him for life and a subsequent devise to his descendants similar to the devise to the descendants of William Hobbs, or else to involve reading the referential words to the first and subsequent sons of the said William Hobbs as including by implication a reference to William Hobbs himself also. But it has this advantage, that it fits in with the general scheme of the will by placing Joseph William Hobbs and his descendants in a position precisely analogous to that in which his first cousin William Hobbs and his descendants are placed under the previous devises in the will and that in which his first cousin James Hobbs and his descendants are placed under the subsequent devises in the will. If this interpretation of this part of the will is adopted, then, for the reasons given in construing the devise to William Hobbs and his descendants, the result is that Joseph William Hobbs took an estate for life only, and that on his death estates were limited to his unborn sons and their sons, which gave his unborn sons under the *cy près* doctrine successive estates in tail male.

The second interpretation that may be put on the referential devise to Joseph William Hobbs and his descendants is that it purported to put, and did put, him not in the same position as William Hobbs, but in the same position as the first and every subsequent son of William Hobbs—that is, not in the same position as his first cousin, but in the same position as each of his first cousins once removed. This is not what one would *prima facie* expect, but the intention, though capricious, is not an impossible one to attribute to a testator. And it is to be noticed in favour of this construction that, in the case of the previous devise to William Hobbs' male issue, the scheme is worked out in two steps, namely, first, by giving successive estates to the first and every subsequent son of William Hobbs, and, secondly, by providing that every such son shall take an estate for life with remainder to his first and other sons successively in tail male. And full and precise grammatical effect would be given to the referential words if they were held to refer to the second provision only, which does

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undoubtedly apply to "the first and every subsequent son of William Hobbs" and does exactly and precisely provide that "every such son may take an estate for life, with remainder to his first and every subsequent son successively in tail male."

This second or alternative interpretation was strenuously contended for by Mr. Clayton in the event of my holding that no estate in tail male was vested in William Hobbs under the devises to him and his descendants; and I think that there is a good deal to be said for it. But I cannot see that, if adopted, it helps Mr. Clayton's clients, for, Joseph William Hobbs being in existence at the date of the will, it seems to me that a devise to him and his sons by reference to a devise to each son of William Hobbs and the sons of each son must be construed and take effect as if the latter devise were repeated with the substitution of Joseph William Hobbs for each son of William Hobbs, and cannot be altered by the fact that no son of William Hobbs was actually born before the death of the testator, and that consequently at the death of the testator any son of William Hobbs that might thereafter be born could only take an estate in tail male *cy près*. For this purpose the will must obviously be construed at the date when it was made and not at the death, and, so construed, the gift is in terms one to Joseph William Hobbs so that he may take an estate for his life, with remainder to his first and every subsequent son successively according to seniority in tail male. I do not see how this can possibly execute an estate in Joseph William Hobbs in tail male under the rule in *Shelley's Case*. (1) Indeed the case here is covered by, and is much less difficult than, the case of *In re Lord Lawrence*. (2)

On the view I have taken of the construction of the devises to William Hobbs and his descendants, and to Joseph William Hobbs and his descendants, no further question arises as to the subsequent devises to James Hobbs and his descendants. The only difference in result comes from the circumstance that all the five sons of James Hobbs were in existence at the date of the testator's death, and indeed at the date of his will, and so each would take an estate for life, with remainder to his sons in tail male.

Accordingly, I propose to make a declaration that, upon the true construction of the will of the testator James Hobbs, deceased,

(1) 1 Rep. 93b.

(2) [1915] 1 Ch. 129.

Joseph William Hobbs in the summons mentioned became, on the death of the testator's son William Hobbs without issue male, entitled to an estate for life only, and not an estate in tail male in the King's Arms public-house and the ten cottages called Hobbs' Crescent and No. 15, Hyde's Place and No. 15, Victoria Place and Amelia Villas, so far as then remaining unsold, and in the India 3 per cent. stock representing so much of the said hereditaments as had been sold under the Settled Land Acts: and, further, that upon the death of James Ebenezer Hobbs on or about the 10th day of November, 1913, without issue male the late plaintiff Job Hobbs became entitled to the same property for life: and, further, that upon the death of the said Job Hobbs without issue male the then unsold portions of the said hereditaments and the proceeds of sale of so much thereof as have been sold under the Settled Land Acts stand limited to the use of the co-plaintiff William George Hobbs for life, with remainder to his first and other sons successively in tail male, with remainder to the defendant James Samuel Hobbs in tail male, with remainders over.

The costs of all parties as between solicitor and client must be raised and paid out of the India 3 per cent. stock or any other capital moneys. There will be liberty to apply, if necessary, as to any income of the property since the death of James Ebenezer Hobbs that may be in the hands of the trustees or of any of them.

F. E.

From this decision the parties interested in the estate of Joseph William Hobbs appealed. The appeal was heard on March 12, 13, and 14, 1917.

*Clayton, K.C.*, and *T. T. Methold*, for the appellants.

*E. P. Hewitt, K.C.*, and *Woodfin*, for the respondents Alice Hobbs and William George Hobbs.

*Maugham, K.C.*, and *Swords*, for the respondent James Samuel Hobbs.

The arguments followed the same lines as those in the Court below, excepting that the respondents laid greater stress on the point (adopted by the Court) that under the terms of the gift Joseph William was not put in the position of William but of

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C. A. William's eldest son and that therefore the rule in *Shelley's Case* (1) did not come in question at all. The following additional authorities were cited: *Whitby v. Mitchell* (2); *Parfitt v. Hember* (3); *In re Richardson* (4); Hawkins on Wills, 1st ed. p. 182; and Jarman on Wills, 6th ed. vol. i. p. 291.

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LORD COZENS-HARDY M.R. This case has been very ably argued, but, having listened to all the arguments, I have come to the conclusion that there is no reason to differ from Sargant J.

Three points were taken in opening the appeal. First, it was said that there was an intestacy, and that by virtue of an arrangement to which I need not particularly refer the appellants had purchased the rights of the heir-at-law. In my opinion there was no intestacy, and it was not seriously argued before us that there was. It is no part of my duty to set up a figment in order to knock it down, and I shall therefore say nothing more about that contention.

We have had a long argument on the rule in *Shelley's Case* (1), but, when once it is seen, as I think it plainly is, that the devise to William gave him only an equitable estate and that the remainder to his issue is legal, it is clear that the rule cannot apply. The rule does not apply unless both estates are legal or both estates equitable. In the latter case equity followed the law, but did not like it, and it therefore availed itself of the opportunity to escape the rule whenever the successive limitations were not both legal or both equitable. On the present will it is too clear for argument that the life estate given to William was equitable and the subsequent limitation to his issue legal.

The testator gave his property to trustees upon trust to receive for or permit his son William to receive the rents, issues, and profits during his life. If that was all, that would not make the estate given to William equitable. That is well settled by various authorities; but the will then contains elaborate provisions against alienation and as to what the trustees are to do with the rents, issues, and profits during the lifetime of William in the event of

(1) 1 Rep. 93b.

44 Ch. D. 85.

(2) (1889) 42 Ch. D. 494; (1890)

(3) (1867) L. R. 4 Eq. 443.

(4) [1904] 1 Ch. 332, 340.

an attempted alienation. It is quite clear that, if William had the legal estate, the restraint against alienation could not operate. I, therefore, think it is evident that the legal estate during the life of William was in the trustees.

Then, passing over what would happen in the lifetime of William in the various events mentioned, we find a gift in remainder to his issue in the following terms: "Unto the lawful issue male in succession of the said William Hobbs, so that every elder son and his issue may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male." I think it is clear that that is a legal devise, and, that being so, the rule in *Shelley's Case* (1) is out of the question altogether.

It follows that William took an equitable estate for life; and if he had had a son living at the testator's death that son would have taken merely a life estate with remainder in tail male to that son's son. In the event, however, of William having a son born after the death of the testator, the issue of such son could not take an estate at all, as he would be the unborn son of an unborn person—this was decided in *Whitby v. Mitchell* (2)—and in that case the son of William would take an estate tail by implication.

What in fact happened was that William died without having had any issue. The limitations in the will proceed: "On failure of such issue to the said Joseph William Hobbs and his issue male" charged with an annuity in favour of Elizabeth Winifred Hobbs "for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs." Joseph William Hobbs survived William Hobbs and died in 1908. There is no referential devise to Joseph William Hobbs for his life, but only to Joseph William Hobbs and his issue for the same estates as the property was limited to the first and every subsequent son of William Hobbs. Then the will proceeds: "On the failure of such issue as aforesaid of the said William Hobbs and Joseph William Hobbs, then I bequeath the said lastly referred to hereditaments unto James Hobbs, son of the said Job Hobbs, for his life, with remainder to his issue male,

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(1) 1 Rep. 93b.

(2) 42 Ch. D. 494; 44 Ch. D. 85.

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for the same estates and in the same order as the said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs." If we write the limitations in favour of the first and every subsequent son of William Hobbs into the referential gift to the issue male of James Hobbs, the resulting limitations are perfectly good in the circumstances of the present case.

I fail to find the difficulty impressed upon us by Mr. Methold in his very able argument. He said that here there was a devise to William Hobbs for life, with remainder to his unborn sons for life, with remainder to the male issue of such unborn sons in tail, and that this would make the gifts subsequent to the life estate of William bad apart from the *cy près* doctrine, and that the rule in such cases was to throw back the estate tail to the earliest stock, so that in the present case an estate tail ought to be implied in William Hobbs, that the same is true in the case of Joseph William Hobbs, and that the estate tail of Joseph William Hobbs was barred so that he became entitled to the fee simple of the property.

The authorities which deal with this question show that in implying an estate tail such estate tail is only thrown back in the manner suggested where it is necessary to do so in order to prevent a gap arising. No such necessity arose in the present case, and accordingly if William had had a son born after the death of the testator an estate tail would have been implied in such son and not in William, and if William had had a son born before the death of the testator there would be no occasion for implying any estate tail, but the son of William's son would take an estate tail under the terms of the devise. For these reasons I am of opinion that the decision of Sargant J. was right.

WARRINGTON L.J. The question is whether Joseph William Hobbs took an estate in tail male or an estate for life in two estates. Sargant J. has determined that he took an estate for life only.

The will begins with a devise to trustees upon certain trusts during the life of William Hobbs. On the true construction of that part of the will, I am clearly of opinion that the trustees took the legal estate and that the estate taken by William was an equit-

able estate only. Then we get an undoubted legal devise over in these terms: "I devise and bequeath the said freehold messuage and premises used as a public-house and known as the King's Arms, and the said ten freehold messuages and premises known as Hobbs' Crescent, unto the lawful issue male in succession of the said William Hobbs, so that every elder son and his issue may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. And on failure of such issue," then over. The estate given to William Hobbs being equitable and the devise to the issue male being legal, there is no room in William's case for the application of the rule in *Shelley's Case* (1), which is a rule of law and not a rule of construction. Therefore we are at liberty to determine the true construction and effect of the devise to the issue of William Hobbs without reference to this rule of law. Then what is the effect of this devise to the issue of William Hobbs? It is, in my opinion, a devise to the issue male of William Hobbs (1.) in succession, and (2.) in such a manner that each son in succession shall take an estate for life, with remainder to the issue of each such son in succession in tail male. In that respect the case is on all fours with *In re Lord Lawrence*. (2) The words "so that every elder son and his issue may be preferred to every younger son and his issue male, and so that every such son may take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male" are explanatory of the way in which the testator wishes the issue of William Hobbs to take the estate.

Unfortunately William Hobbs had no issue, and therefore no son was living at the death of the testator. Literally the devise in the form in which we find it cannot take effect, because it is impossible to limit an estate to the issue of an unborn person after an estate to that unborn person. But fortunately the doctrine of *cy près* or approximation comes in, which enables you, if you find a paramount intent to exhaust a particular line of issue, to regard estates given in terms to unborn persons for life with remainder to their issue as creating estates tail in favour of the unborn persons.

(1) 1 Rep. 93b.

(2) [1915] 1 Ch. 129.

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According to that doctrine as explained in *Vanderplank v. King* (1), you may mould the devise, as it were, to suit the event; and by the application of this doctrine you may read such a devise as this as if it were a gift to each son of William who might be born in the lifetime of the testator of an estate for life with remainder to his issue in tail male in succession, and a devise to each son born subsequently to the death of the testator of an estate tail. That seems to me to be the true construction of this gift. That brings me to the devise which has directly to be construed, which is in these terms: "to the said Joseph William Hobbs and his issue male, charged with the said annuity to or in favour of and to be paid to the said Elizabeth Winifred Hobbs during her life, for the same estates and in the same order as my said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs, or, if the said William Hobbs shall not have been in England within the said ten years and continued to reside therein, then, after the decease of the said Joseph William Hobbs, I devise the said lastly referred to hereditaments to his issue in like manner as on the failure of issue of the said William Hobbs. And on the failure of such issue" (that is issue male). "as aforesaid of the said William Hobbs and Joseph William Hobbs, then I bequeath the lastly referred to hereditaments to James Hobbs, son of the said Job Hobbs, for his life, with remainder to his issue male, for the same estates and in the same order as the said hereditaments are hereinbefore limited to the first and every subsequent son of the said William Hobbs." The gift to Joseph William Hobbs and his issue male is by reference to the gift to the sons of William Hobbs. Joseph William Hobbs was living at the death of the testator, and therefore stands, not in the position of William Hobbs, but in the position of a son of William Hobbs living at the death of the testator, and takes an estate for life, with remainder to his sons in tail male, under the express terms of the gift which is perfectly good.

The estate is given over on failure of issue male of Joseph William Hobbs, and it is said that because of that we ought in default of issue of Joseph William Hobbs to imply an estate tail in Joseph William Hobbs himself. If the construction of the gift to Joseph

William Hobbs and his issue is what I have said it is, there is no ground for implying an estate tail in Joseph William Hobbs, as the whole of his issue male have been exhausted and there is no gap. That disposes of the whole case, and for these reasons I am of opinion that the judgment of Sargant J. was right.

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SCRUTTON L.J. I agree. Having listened to the judgments and the very interesting arguments in this case, I have come to the conclusion that I cannot usefully add anything.

Solicitors: *Howard & Shelton; Alfred Slater & Co.; W. H. Smith & Son.*

W. I. C.

*In re* HICKEY.

NEVILLE J.

BEDDOES *v.* HODGSON.

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Feb. 7, 8, 26.

[1916 H. 634.]

*Will—Construction—Legacy—Gift to “the descendants of A. or their descendants living at my death”—Substitutional Gift—“Descendants” limited by Context to “Children”—Children of Child dead at Date of Will entitled to share.*

A testator gave a pecuniary legacy to “the descendants of A. or their descendants living at my death.” A. had six children, one of whom was dead at the date of the will, leaving children and grandchildren, all of whom were living at the death of the testator. The other five children of A. were living at the date of the will and survived the testator. On the question of the class entitled to the legacy:—

*Held*, that the words “living at my death” governed the whole gift.

*Held*, also, that on the true construction of the will, there was a direct gift of five-sixths of the legacy to the five children of A. who survived the testator equally as tenants in common, and of the remaining one-sixth to the grandchildren of A. who survived the testator as joint tenants.

*Christopherson v. Naylor* (1816) 1 Mer. 320 considered.

ADJOURNED SUMMONS.

P. Hickey, by his will dated May 17, 1909, appointed the plaintiff his executor, and directed his real and personal estate to be sold within two years of his death and the proceeds to be divided into

NEVILLE J. four equal parts. And the testator, after disposing of three of such  
 1917 fourth parts, gave the remaining fourth part in legacies. One of  
 HICKEY, such legacies was as follows: "To the descendants of my Aunt  
*In re.* Anna Stokes or their descendants living at my death five thousand  
 BEDDOES pounds."  
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The testator died in April, 1915. His aunt, Anna Stokes, was dead at the date of his will; but five of her children, seven of her grandchildren, and seven of her great-grandchildren were living at the death of the testator.

Elizabeth Stokes and Gabriel Stokes were two of such children.

Anna Stokes had another daughter, Henrietta Garbutt, who died in 1902, leaving seven children who survived the testator, and they were the seven grandchildren of Anna Stokes above referred to. Lady Winifred Stokes was one of such grandchildren.

Three of the above-mentioned grandchildren were married, and it was their children who formed the class of the seven great-grandchildren of Anna Stokes. Mary Muriel Stokes was one of such great-grandchildren.

On the death of the testator the question arose as to the class entitled to take under the above bequest, and the plaintiff issued a summons to determine the matter.

*MacSwinney*, for the plaintiff.

*Dighton Pollock*, for Lady Winifred Stokes. The word "descendants" means prima facie children and grandchildren and their children to any degree: *Ralph v. Carrick* (1); but it is submitted that here some limit must be placed on the word "descendants" first mentioned and that it means "children." The word "issue" has been read to mean "children" in a gift to "issue of issue": *Jarman on Wills*, 6th ed. vol. ii. p. 1600; *Pope v. Pope* (2); *Livesay v. Walpole*. (3) It is a question of intention in each case, and, as *Romer L.J.* pointed out in his dissenting judgment in *In re Gorringer* (4), the language of the will is to be first considered apart from authority. In that case the decision of the Court of Appeal was reversed by the House of Lords (*Gorringer v. Mahlstedt* (5)

(1) (1879) 11 Ch. D. 873, 883.

(3) (1875) 23 W. R. 825.

(2) (1851) 14 Beav. 591.

(4) [1906] 2 Ch. 341, 347.

(5) [1907] A. C. 225.

who held on the particular will that the children of a child dead at the date of the will did not share in the residue, but the judgment of Romer L.J. was approved. Here the words "living at my death" govern the whole clause, and there is a good original gift to a composite class consisting of the five children and seven grandchildren of Anna Stokes living at the death of the testator, and they all take equally per capita: *Loring v. Thomas* (1); *In re Sibley's Trusts* (2); *In re Williams* (3); *Gowling v. Thompson*. (4) The words "or their descendants" are redundant.

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*Ward Coldridge, K.C.*, and *Church*, for Henrietta Stokes. The testator knew the state of the family and that Henrietta Garbutt was dead at the date of his will. Here in the first instance "descendants" means "children," and there is a good gift to the five children of Anna Stokes who were living at the date of the will and survived the testator, with a substitutional gift, which did not operate, to their issue if any of them should predecease the testator, and none of the issue of Henrietta Garbutt who was dead at the date of the will are entitled to share: *Christopherson v. Naylor* (5); *Congreve v. Palmer* (6); *In re Webster's Estate*. (7)

*Percy Wheeler*, for Mary Muriel Stokes. There is not a substitutional gift at all, and it is immaterial when anybody died. Under a gift to "descendants" all the issue of every degree living at the date of distribution take equally per capita: Theobald on Wills, 7th ed. pp. 319, 322; Jarman on Wills, 6th ed. vol. ii. p. 1588. If the clause had stopped at "To the descendants of Anna Stokes" there is a clear gift to every descendant living at the death of the testator, which includes her children, grandchildren, and great-grandchildren. The difficulty is caused by the addition of the words "or their descendants," which, it is submitted, are ambiguous and should be rejected as surplusage, leaving the previous clear gift unaffected: *In re Roberts*. (8)

*Hodge*, for Gabriel Stokes.

*D. Robertson*, for a party interested.

*Cur. adv. vult.*

(1) (1861) 1 Dr. & Sm. 497.

(2) (1877) 5 Ch. D. 494, 499.

(3) [1914] 1 Ch. 219; [1914] 2 Ch. 61.

(4) (1868) L. R. 11 Eq. 366 n.

(5) 1 Mer. 320.

(6) (1853) 16 Beav. 435, 438.

(7) (1883) 23 Ch. D. 737.

(8) [1903] 2 Ch. 200, 204.



NEVILLE J. Feb. 26. NEVILLE J. Before dealing with the construction of the will in this case I desire to consider the effect of the decision in *Christopherson v. Naylor*. (1) It is said that some principle, by which I understand some rule of construction, was laid down in *Christopherson v. Naylor*. (1) The construction placed upon the will in that case was to my mind reasonable enough, but I am not (possibly owing to some intellectual infirmity of my own) impressed by the reasoning which appears to have led to it. The alleged principle seems to be that the meaning of the word "substitute" involves the idea of replacing one thing by another. One cannot "substitute" something for nothing. This proposition appears to me to be axiomatic but not very illuminating. If a testator uses the word its meaning must affect the construction of his will; but where the Court uses it it is merely a mode of expressing a view of the construction already formed. I respectfully concur in the view expressed by the late Sir George Jessel in *In re Sibley's Trusts* (2) that the supposed principle is merely the statement of a truism. If one is satisfied that by the gift the children of a class are intended to take by substitution the share of their parents where the gift to the parent fails, it is obvious that children who are not the children of any member of the class can take nothing. The real question must always be who are the persons intended to benefit, whether directly or by substitution. In other words, to label the gift as substitutional you must have already construed the will.

I proceed to the consideration of the will before me. The words of the gift to be construed are "to the descendants of my Aunt Anna Stokes or their descendants living at my death." I think the words "living at my death" govern the whole sentence. I find nothing in the context to assist in the construction. Anna Stokes had six children: five of them were living at the date of the will and survived the testator; one was dead at the date of the will leaving children and grandchildren. The children survived the testator. It has been said, and I think truly, that the meaning of the word "descendants" is less easy to control than the meaning of the word "issue." Laymen (in this respect more accurate, I think, in their use of language than lawyers) mean by "issue" children. With lawyers it has a technical and wider meaning and

(1) 1 Mer. 320.

(2) 5 Ch. D. 494.

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includes descendants of all degrees. It is not difficult to suppose that in using the word "issue" a testator may have intended the natural and not the technical meaning of the word. There is, on the other hand, no technical meaning attaching to the word "descendants" which embraces generation after generation. In the present case, however, if any meaning is given to the words "or their descendants," the meaning of "descendants" in the earlier part of the sentence must necessarily be limited. The gift is alternative. There cannot be a gift to A. or A., and therefore, descendants in the later part of the sentence cannot mean the same class or persons as descendants in the first part. I think that a reasonable interpretation may be put upon the gift by reading "descendants" as descendants of a single generation whether immediate or more remote. Then if the words "or their descendants" involve, as I think they do, a stirpital gift (see on this point *Congreve v. Palmer* (1)), the legacy would be divided into as many shares as there are stocks. There would be a direct gift to the children of Mrs. Stokes living at the date of the will and also to the children of the deceased child. There would be a substitutional gift in case of death in the testator's lifetime of the share taken by the original legatees to the next generation, or if they had failed to the next "living at my death." This construction appears to me to be the right one and to give a reasonable meaning to the words the testator has used.

The result is that the legacy will be divided into sixths, five-sixths of which will go to the children of Mrs. Stokes equally as tenants in common and the remaining sixth to the children of the deceased child as joint tenants. I have been urged to disregard the words "or their descendants" altogether on the ground that they are obscure and follow a gift which is clear. I think, however, that would be to adopt a counsel of despair. The words are all part of the same gift, and a meaning must be attributed to them if possible. I think the construction I have adopted is consistent with the words used and gives effect to all of them.

Solicitors : *Cecil Twist, for Twist & Sons, Coventry ; Bower, Cotton & Bower, for Bradley & Hulme, Folkestone ; Vizard, Oldham & Co.*

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BURCH v. FARROWS BANK, LIMITED.

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[1916 B. 2262.]

March 6, 7.

*Landlord and Tenant—Lease for a Term—Repairing Covenant by Lessee  
—Breach—Power for Lessee to determine Lease—Notice to determine  
—Condition precedent—Repairs commenced before but completed  
shortly after Expiration of Notice—Invalid Notice.*

A lease for a term of years contained the usual covenant by the lessee to repair and deliver up in good and substantial repair the demised premises, with a proviso that if the lessee should desire to determine the lease at the expiration of the third, seventh, and fourteenth year of the term and should of such desire give six months' previous notice in writing to the lessor, "and shall pay all the rent and perform and observe all the covenants hereinbefore reserved and contained and on the part of the lessee to be paid, performed and observed up to such determination, then and in such case immediately after the expiration of the said term of three, seven or fourteen years as the case may be this lease and the term hereby granted shall absolutely cease and determine but without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant." Under this proviso the lessee gave the lessor a six months' previous notice in writing to determine the lease at the expiration of the seventh year of the term and, the premises being out of repair, commenced repairs shortly before and completed them a few days after the date for the determination of the lease:—

*Held*, that the performance of the covenant to repair was a condition precedent to the determination of the lease notwithstanding the qualifying words "without prejudice," &c., concluding the proviso; and that, the condition not having been fulfilled, the notice was bad and the lease had not determined.

*Grey v. Friar* (1854) 4 H. L. C. 565 followed.

#### WITNESS ACTION.

By an indenture of lease dated June 19, 1909, the plaintiff demised to the defendant bank No. 50, High Street, Peckham, in the county of London, for the term of twenty-one years from June 24, 1909 (determinable nevertheless as thereafter mentioned), at the rent thereby reserved, payable quarterly upon the terms and conditions therein contained, including usual covenants by the bank at its own cost to well and substantially repair, paint, paper, and keep the premises in good and tenantable repair and condition, "and

the same premises being in all things well and sufficiently repaired, NEVILLE J. hereby granted which shall first happen to surrender and yield up to the lessor . . . . Provided also and it is hereby agreed and declared that if the lessee shall be desirous of determining this lease at the expiration of the first three, seven or fourteen years of the term hereby granted and of such desire shall give to the lessor six calendar months' previous notice in writing and shall pay all the rent and perform and observe all the covenants hereinbefore reserved and contained and on the part of the lessee to be paid performed and observed up to such determination, then and in such case immediately after the expiration of the said term of three, seven or fourteen years as the case may be this lease and the term hereby granted shall absolutely cease and determine, but without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant." The lease also contained the usual proviso of re-entry for non-payment of rent or breach of any of the covenants.

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On December 8, 1915, the bank gave the plaintiff notice in writing to determine their lease on June 24, 1916, but possession was not given him on that date. In August, 1916, the plaintiff commenced this action, and by his statement of claim alleged that the bank did not surrender the lease on June 24, 1916, but continued in possession after that date, and had failed or neglected to perform and observe the repairing covenants in respect of the premises prior to June 24, 1916, and he claimed a declaration that the notice of December 8, 1915, was in the events that had happened ineffectual, that the lease was still subsisting and binding upon the bank, and that they were bound accordingly to pay the rent reserved by the lease and otherwise to perform and observe the conditions of the lease.

The bank by their defence denied that they remained in possession after June 24, 1916, and pleaded that if in fact they remained in possession or occupation of the premises (which they denied) they did so at the implied request and with the implied consent of the plaintiff for the purpose of carrying out repairs which the plaintiff had called upon them to execute under their covenants in the lease and solely for such purpose and for a very short period, and that



NEVILLE J. they did not thereby waive or abandon their notice to determine the lease ; and they also denied that they had failed or neglected to perform or observe the repairing covenants contained in the lease.

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It appeared from the evidence that, on the plaintiff receiving the notice to determine the lease, correspondence ensued between him and the bank, and subsequently between their respective solicitors, as to the repairs to be executed on the premises by the bank, but the parties could not agree ; that eventually the bank prepared a schedule of repairs which they commenced on June 23, 1916, and completed on July 11, and that on June 24 the premises were in the occupation of an undertenant of the bank.

*Jenkins, K.C.*, and *Draper* (for *A. L. Ingpen*, serving with His Majesty's Forces), for the plaintiff. The repairs were not completed until after June 24, 1916, and therefore the issue is whether the performance of the covenant to repair is a condition precedent to the determination of the lease. We contend that it is. The cases of *Porter v. Shephard* (1), *Grey v. Friar* (2), and *Stait v. Fenner* (3) bear directly on the point. In *Porter v. Shephard* (1) and *Stait v. Fenner* (3) the proviso did not contain the qualifying words "without prejudice," &c., and it was held that the performance of covenants was a condition precedent to the validity of the notice and the determination of the lease. In *Grey v. Friar* (2), which is most like the present case, the qualifying words occur and the judges were not unanimous, but the majority of them were of opinion that the words did not modify the previous condition. The clause is very similar to the form in conveyancing text-books giving lessees power to determine a lease, and is said to operate as a condition precedent : Davidson's Conveyancing Precedents, 3rd ed. vol. v. part i. p. 340 ; Key and Elphinstone's Conveyancing Precedents, 10th ed. vol. i. p. 884. It is submitted that the notice was invalid and the lease was not determined. Lastly, on the evidence there was no waiver by the plaintiff of the condition precedent.

*Ward Coldridge, K.C.*, and *H. S. Preston*, for the bank. In the

(1) (1796) 6 T. R. 665.

(2) 4 H. L. C. 565.

(3) [1912] 2 Ch. 504.

cases cited the language of the proviso is distinguishable from that NEVILLE J. in the present case. In each of them the covenants had to be performed before the expiration of the notice. In *Porter v. Shephard* (1) the words were "from and after" the performance of the covenants. In *Grey v. Friar* (2) the words were all the covenants "having been performed and observed." In *Stait v. Fenner* (3) the words were not quite so strong. Here they are words of futurity, "if the lessee shall pay the rent and observe and perform the covenants," and are a covenant and not a condition: *Hays v. Bickerstaffe*. (4) Here the bank on giving the notice must perform the covenant to repair, but it might be impossible to do the repairs by the expiration of the notice. If they were completed a month before the notice expired, the premises might by some unforeseen circumstance be put out of repair in the last month, and that is provided for by the qualifying words "without prejudice," &c., which expressly reserves the respective common law rights of the parties. Therefore the lessee must have a reasonable opportunity of completing the repairs after the determination of the lease, and in this connection we rely on the judgment of Parke B. in *Grey v. Friar*. (2) In *Blore v. Giulini* (5) Wright J. held that the lessor's right to sue for breaches of covenant was not gone although the lease had been determined on notice by the lessee, and *Hartshorne v. Watson* (6) is to the same effect. Here the qualifying words are inconsistent with the view that the previous words of the clause create a condition precedent. If the lease is determined, the bank's remaining in possession will not operate as a renewal of the lease but will be a holding over in the ordinary way, for which the plaintiff will have the usual remedies of a landlord. Lastly, we submit on the correspondence that the conduct of the plaintiff amounted to a waiver of the condition precedent. [They also cited *Rede v. Farr* (7), *Hyde v. Watts* (8), and *Bishop v. Elliott*. (9)]

*Jenkins, K.C.*, in reply, referred to *Bastin v. Bidwell*. (10)

(1) 6 T. R. 665.

(2) 4 H. L. C. 565.

(3) [1912] 2 Ch. 504.

(4) (1674) 2 Mod. 34.

(5) [1903] 1 K. B. 356.

(6) (1838) 4 Bing. N. C. 178.

(7) (1817) 6 M. & S. 121.

(8) (1843) 12 M. & W. 254.

(9) (1855) 24 L. J. (Ex.) 229,  
232.

(10) (1881) 18 Ch. D. 238.

NEVILLE J.

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This case raises a point of general importance, because it deals with a clause which usually occurs in leases. To clear the ground I will state my view of the correspondence between the parties in June, 1916, upon which it has been said that there was a waiver of the performance of the condition precedent. In my opinion there was no waiver, and therefore I have to consider this case apart from that question. It is a lease for twenty-one years, and it contains this clause: [His Lordship read the clause providing for the determination of the lease on notice by the lessee, and continued:] First of all, I am of opinion upon the construction of the clause that the language used makes the performance and observance of "all the covenants hereinbefore reserved and contained" a condition precedent to the determination of the term and the validity of the notice, power to give which is provided for by this clause. I think the words used are without doubt words of condition in themselves. Then the question arises, and it is the difficult part of the case, whether the concluding words "without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant" are sufficiently strong to show that the prior words of condition ought not to be read in their primary sense, but ought to have either no importance attached to them or to have some secondary sense attributed to them. What that secondary sense may be I do not very clearly see, because it seems to me they must be either words of condition, or they might just as well have been omitted from the clause. This is not a case in which I can approach the matter free from authority, because there have been several cases in which very similar clauses have been considered, and when once I come to the conclusion, as I do, that the prior words are *prima facie* words of condition, the case comes into line with *Porter v. Shephard* (1), *Grey v. Friar* (2), and *Stait v. Fenner* (3), and then the only question is whether the meaning of the prior words must be modified, having regard, I will not say to the lease as a whole, but to the effect of the concluding words of this particular proviso, because there is nothing else in the lease which I think throws any light on the construction which ought to be put on

(1) 6 T. R. 665.

(2) 4 H. L. C. 565.

(3) [1912] 2 Ch. 504.

this qualification, so to speak, to the terms of the proviso. With NEVILLE J. regard to *Porter v. Shephard* (1) and *Grey v. Friar* (2), it is to be observed that the clause provided that upon the expiration of the notice the lease became "void," and in both those cases that fact was relied on as one of the grounds upon which it was held that the words must be treated in their natural sense and the force of their primary meanings given to them. In both cases the Court intimated that, if the condition precedent was not fulfilled and the term came to an end, the right of the landlord to sue the tenant for any antecedent breaches would be gone. Now that may be right or may be wrong. There is a good deal said by the judges in *Grey v. Friar* (2) which indicates that some of them, at all events, thought that would be wrong, and there is the decision of Wright J. in *Blore v. Giulini* (3), in which he held that the words were not to be construed so as to take away from the landlord any rights he might have in respect of breaches of covenant in a lease. It is not necessary for me to decide that point, because there are no such words contained in the clause that I have before me, and I only refer to them in order to say, having regard to what I said in *Stait v. Fenner* (4), that it is a matter which may some day have to be further inquired into and a definite conclusion arrived at with regard to words such as "void" or "utterly void" which have been used in some of the cases, and with those remarks I leave that point because it does not affect the decision in the present case.

*Porter v. Shephard* (1) and *Stait v. Fenner* (4) are decisions to the effect that, but for the concluding words of the clause, I must hold that the words used here impose a condition, that condition being necessarily a condition precedent. Then comes the question whether I am bound by the decision in *Grey v. Friar* (2) to hold that the insertion of the words at the end "without prejudice to the remedies," &c., do not modify the meaning which ought to be placed upon the words of the condition contained in the earlier part of the clause, and I think that case is a clear decision that words such as these reserving a right on the part of the landlord to sue notwithstanding the determination of the term are not

(1) 6 T. R. 665.

(2) 4 H. L. C. 565.

(3) [1903] 1 K. B. 356.

(4) [1912] 2 Ch. 504.



NEVILLE J. sufficient to modify the meaning of the words creating the condition in the earlier part. I need not give any elaborate reasons for coming to that conclusion, because I think the reasoning of the judges who assisted in the decision in *Grey v. Friar* (1) in the House of Lords puts all the grounds on which such a decision should be based. It is obvious, to take only two examples, that there might be breaches of covenant which were unknown to the lessor at the time when he accepted the surrender of the lease and put an end to the term, and there might also be breaches of covenant which the lessor did not think it right to insist upon as depriving the lessee of his right to determine the lease upon giving notice, cases in which he was prepared to rely upon a remedy in damages. It appears to me that, if I were to hold in this case that the words at the end of the clause were strong enough to control the meaning of the words creating the condition, I should really be relying upon verbal differences, without any substance, to distinguish this case and *Grey v. Friar*. (1) I have been referred to the practice of conveyancers and the meaning they attribute to words such as these, and in both the books of the distinguished authors to which I have been referred it is laid down as deduced from the cases, and I think rightly deduced, that words such as these do create conditions precedent. That being the practice of conveyancers, it seems to me in the last degree undesirable to make minute distinctions between one form of expression and another when to any plain mind the intention of the parties is identical. I think, therefore, in the present case, inasmuch as the covenants to repair were not fulfilled until July 11—June 24, being the date when, if the notice was good, the lease would have been determined—that the notice was bad and the lease was not determined but is still subsisting.

Solicitors : *S. Hughes, Sons & Minton ; Loxley, Elam & Gardner.*

(1) 4 H. L. C. 565.

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## LEE v. RAYSON.

[1916 L. 1964.]

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Feb. 26, 27.

*Vendor and Purchaser—Ground Rents—Contract—Construction—Misdescription—Rescission—“ Misstatement or error in the description of the premises ”—Substantial or material.*

In deciding whether a purchaser is getting substantially that which he bargained for, the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

By an agreement in writing a vendor agreed to sell, and a purchaser agreed to purchase, thirteen freehold houses let on six leases for a term of ninety-nine years at ground rents amounting in the aggregate to 72*l.* One pair of houses was described in the contract as let at one entire rent of 11*l.* 10*s.*, each of the next four pairs at one rent of 11*l.*, and the last three houses at one rent of 16*l.* 10*s.* The title shown was for twelve houses at a rent of 5*l.* 10*s.* each, and one at a rent of 6*l.*, each of such rents issuing out of and secured by one of the thirteen houses instead of the six rents described in the agreement. The agreement contained a provision that “ if there be any misstatement or error in the description of the premises ” no compensation should be allowed or the sale annulled.

In an action by the purchaser for rescission of the contract and a return of the deposit on the ground of misdescription :—

*Held*, that the property which the vendor offered to convey was substantially different from that which the purchaser contracted to buy; that the clause providing that a misstatement or error should not annul the contract did not apply; and the purchaser was entitled to rescission and a return of his deposit.

## ACTION WITH WITNESSES.

By an agreement in writing dated July 24, 1916, the defendant, Charles Knowles Rayson, agreed to sell, and the plaintiff, Richard Henry Lee, agreed to purchase, the premises thereafter described (being certain freehold ground rents) for the sum of 1400*l.*, the title to which was, by clause 8 of the agreement, to commence with the counterparts of the leases by which the ground rents thereby sold were reserved. The purchase was to be completed on or before August 7, 1916.

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By clause 4 of the agreement it was provided that "If there be any misstatement or error in the description of the premises, no compensation shall be allowed, nor shall the same annul the sale." By clause 5 the property was sold subject to existing tenancies and with full knowledge of the state of repairs and other matters. "The particulars of the freehold property sold" were set out and described in a schedule at the foot of the agreement as Nos. 1 to 25 (odd numbers), Tunis Road, Uxbridge Road, Shepherd's Bush. Nos. 1 and 3 leased for ninety-nine years from June 24, 1881, at 11*l.* 10*s.* per annum; Nos. 5 and 7, 9 and 11, 13 and 15, 17 and 19, leased for the same term at 11*l.* per annum; and Nos. 21, 23, and 25 similarly leased, at 16*l.* 10*s.* per annum, the total rental being 72*l.* per annum. Pursuant to the terms of the agreement a sum of 140*l.* was paid as a deposit.

From the abstract of title it appeared that a title was deduced to twelve ground rents of 5*l.* 10*s.* each, and one of 6*l.*, each rent issuing only out of, and secured by, one of the thirteen houses, instead of the six rents therein mentioned, each of the first five rents issuing out of and secured by two of such houses, and the sixth issuing out of and secured by three of such houses.

The plaintiff alleged in his statement of claim that the property to which a title was so purported to be deduced was not the property which he had agreed to buy, but was essentially different therefrom; and that, if such property had been correctly described, he would never have agreed to purchase the same. On August 2, 1916, the plaintiff gave notice to the defendant rescinding the contract, and requiring the return of the deposit. This being refused, this action was brought for rescission of the agreement and repayment of the deposit.

The defendant, by his defence, denied the alleged misdescription, inasmuch as the thirteen houses were in fact leased by six leases as stated in the schedule, and at the rents set opposite thereto. He also relied upon clause 4 of the agreement that if there were any misstatement or error in the description of the premises it should not annul the sale, and he counterclaimed for specific performance of the agreement.

The plaintiff inspected the property prior to the contract, but did not ask to see the leases and made no inquiry as to their contents.

His evidence was that until the contract reached him he was under the impression that the ground rent was one entire rent of 72*l.* secured on all the houses.

There was also evidence by auctioneers and valuers that the fee for collecting ground rents was a percentage on the total amount, and was not affected by the fact of the amount being collected in one sum or in numerous small sums ; and, further, that the market value was also substantially the same whether the ground rents were collected in one sum or in several sums.

*Clayton, K.C.*, and *A. G. Roby*, for the plaintiff. Upon the authorities, even supposing that clause 4 of the contract covers this particular misdescription, it does not apply where the result is that the purchaser gets something different from that which he contracted to buy : *Cox v. Coventon* (1) ; *Camberwell and South London Building Society v. Holloway* (2) ; *Redgrave v. Hurd* (3) ; *Jacobs v. Revell*. (4) Here the misdescription is most material. Two small rents secured each on one house are not the same thing as the combined rents secured on two houses. Clause 4 of the contract does not apply. The misdescription is in respect of " the premises," and it is submitted that those words refer to the particular houses in Tunis Road : *In re Beyfus and Masters's Contract* (5), where it was held that an error in the description of the property meant a misdescription of the corporeal property ; so also in *In re Boulton and Cullingford's Contract* (6), where a misstatement of ground rents was held to be material and a similar clause was held not to apply.

*Maugham, K.C.*, and *A. F. Topham*, for the defendant. First, there is no misdescription. The words " the premises " are used in the legal sense, and do not mean the actual houses, but the subject-matter of the contract, the ground rents. These rents were correctly stated as to the total amount, and as to the number of leases. The value of the premises is practically the same, according to the evidence of experts, and the purchaser gets substantially that for which he contracted. But, secondly, if there be any

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(1) (1862) 31 Beav. 378.

(2) (1879) 13 Ch. D. 754, 762.

(3) (1881) 20 Ch. D. 1, 22.

(4) [1900] 2 Ch. 858, 863.

(5) (1888) 39 Ch. D. 110.

(6) (1892) 37 Sol. J. 25.



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misdescription it must be on a material point and of a substantial character, as laid down in *Jacobs v. Revell*. (1) Here there is no material difference and the misstatement is trifling in character. Clause 4 of the contract therefore applies, and the contract is enforceable by the defendant: *Shepherd v. Croft*. (2) In that case the latent defect in the property was much more substantial than in the present, and yet the vendors were held entitled to specific performance.

*Clayton, K.C.*, in reply.

EVE J. This case has given rise to an interesting discussion. It is an action wherein the plaintiff, as purchaser of certain real estate, claims to rescind the contract and to recover his deposit; and the vendor by counter-claim seeks to have the contract specifically performed. I think possibly some confusion may be avoided by dropping, so far as one can, any allusions to “ground rents” or “freehold ground rents” and by adhering to a more accurate description of the subject-matter of the contract. That subject-matter was thirteen freehold houses situate in Tunis Road, Uxbridge Road, Shepherd’s Bush, let on six leases for a term of ninety-nine years from June 24, 1881, at rents amounting in the aggregate to 72*l.* per annum. Prior to the contract, which is dated July 24, 1916, the plaintiff had visited the property, but although he called on the agent of the auctioneers, by whom the matter was introduced to him, he did not ask for inspection, nor did he make any inquiries as to the contents of the leases, nor ascertain how many leases there were, or how the rent was reserved. I accept his evidence that down to the date on which he signed the contract he was in the belief that the rent of 72*l.* was one entire rent reserved in respect of all the houses. The contract, however, to which I now turn, showed him that this belief was not well founded, as the property is therein described as subject to six leases. The particulars of the property sold are contained in the schedule at the foot of the contract and are therein described as follows: [His Lordship read the particulars and continued:] What is the true construction of that description? Prima facie it is, I think, that the first pair of houses is let at one entire rent of 11*l.* 10*s.*, that each of the next

(1) [1900] 2 Ch. 858.

(2) [1911] 1 Ch. 521.

four pairs is let at one rent of 11*l.*, and that the last three are let at one rent of 16*l.* 10*s.* Is there anything in the contract to rebut this *prima facie* construction? I think not. On the contrary, I think the terms of clause 8, which provides that "The title shall commence with the counterparts of the leases by which the ground rents hereby sold are reserved," confirm it. The expression "ground rents hereby sold" refers to the rents particularized in the schedule, and amounts to a statement that the ground rents sold are those of 11*l.* 10*s.*, 11*l.*, and 16*l.* 10*s.* The importance of this conclusion is this, that, assuming it to be correct, the defendant cannot rely upon the fact that the plaintiff did not inspect the leases and argue that if he had exercised due caution and made such inspection he would have found out the true facts. Having misstated the contents of the leases, it is not open to the defendant to say an inspection thereof by the plaintiff would have disclosed to him that the statement of their contents was indeed inaccurate. For, in truth, there were no such rents reserved by the leases. In each lease a separate rent is reserved for each house. There is, therefore, an inaccurate statement in the contract in reference to each lease—in other words, "a misstatement or error in the description." Is this a misstatement or error to which clause 4 of the contract has any reference? The plaintiff, relying on the decision of the Court of Appeal in *In re Beyfus and Masters's Contract* (1), says "No"; the defendant, relying on the construction of this contract, says "Yes." Upon this part of the case I think the defendant is right. In my opinion the words "the premises" in clause 4 have the same meaning as they have in clause 1, where it is agreed that "the vendor will sell and the purchaser will purchase the premises hereinafter described . . . ." They mean the subject-matter of the contract, the parcels, and, from the description of the parcels, nothing contained in the schedule can, in my opinion, legitimately be omitted. I do not think the case referred to has any application here.

These conclusions bring us, therefore, to this point—that there is a misstatement or error in the description of the premises contracted to be sold, but one for which no compensation is to be allowed, and which will not annul the sale unless it is "in a material and substantial point so far affecting the subject-matter of the

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contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all." I am reading these words from part of the judgment of Tindal C.J. in *Flight v. Booth* (1), quoted by Buckley J. in *Jacobs v. Revell*. (2) The question is, Can it be said that this misstatement is of the character there indicated? The defendant says "No," and in support of that negative proposition he has called evidence which establishes this, that the property sold is from a pecuniary point of view of the same value whether the rents have to be collected from or in respect of each of the thirteen houses separately, or whether they have to be collected from or in respect of each pair of houses. The result of this evidence may, I think, be summarized in these terms: Where a ground rent, or a parcel of ground rents, is adequately secured, the value in the market is wholly unaffected by the question whether or no they are collected in one sum or in several sums. The agent's remuneration is the same percentage—2½ per cent.—in each case, and buyers of this class of property fix the number of years' purchase any particular lot is worth wholly without reference to the number of persons from whom its component parts have to be collected. The evidence, I confess, took me a little by surprise, but it is not disputed. Indeed, the experts on both sides were substantially agreed on these points. Therefore, says the defendant, this ground rent of 72*l.*, whether payable in one sum and by one person, or in six sums and by six persons, or in thirteen sums by thirteen persons, has the same market value, and accordingly it is impossible for the Court to hold that the misstatement is a substantial or material one. I agree that if the element of value were the only factor to be taken into account this argument would be conclusive, but that it is not the only factor will be demonstrated by a moment's consideration. A vendor could not fulfil a contract to sell Whiteacre by conveying Blackacre, although he might prove to demonstration that the value of the latter was largely in excess of the value of the former. Value, no doubt, is an element to be taken into account in determining whether an error in description is substantial or material, but it is certainly not the only element, nor, in my opinion, the dominant one. A statement of Lord Eldon's, quoted by Buckley J. in the case to

(1) (1834) 1 Bing. N. C. 370, 377.

(2) [1900] 2 Ch. 866.

which I have already referred—*Jacobs v. Revell* (1)—indicates, in my opinion, the pertinent inquiry which has to be answered. It is in *Knatchbull v. Grueber* (2), where Lord Eldon says: “This Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have.”

I take that to mean that what the Court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

In the present case, according to the construction I have placed on the contract, the property agreed to be sold was five pairs of houses, of which one pair was let at a rent of 11*l.* 10*s.* and four pairs at a rent of 11*l.*, and three houses let at one rent of 16*l.* 10*s.* The property which the vendor offers to convey is, in my opinion, substantially different. The rights of the freeholder of two houses let at separate rents of 5*l.* 10*s.* each are essentially different from what his rights would be as the freeholder of two houses let at one entire rent, and when these differences are multiplied six times, as they are here, I cannot entertain any doubt but that the purchaser, if compelled to perform this contract, would be forced to take something for which he never bargained.

Accordingly I hold the plaintiff to be entitled to rescind the contract. His deposit with interest at 4 per cent. must be repaid to him, and the defendant must pay the costs of the action. The counter-claim will be dismissed with costs.

Solicitors: *Biddle, Thorne, Welsford & Gait, for Allen, Whitfield & Hodgson, Manchester; May, Woulfe & Gwyther.*

(1) [1900] 2 Ch. 858, 863.

(2) (1817) 3 Mer. 124, 146.



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March 7, 16.

*In re* WILKINSON'S SETTLEMENT.

BUTLER *v.* WILKINSON.

[1915 W. 2928.]

*Power of Appointment—Special Power to appoint by Will—Donee with Italian Domicil—Exercise by unattested Italian Will—Conflict of Laws—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, 27.*

By a marriage settlement of English personal property, made in 1855, the property was given to trustees "in trust for such of the children of the marriage as" (in the events that happened) W. should by will appoint. W. died in 1914 in Italy, having acquired an Italian domicil, and having by her will expressed the desire that the unmarried children "should have equal shares in the money which is left," naming the items of the settled property, "and any other property which I can have the power and the right to dispose of." The will was valid according to Italian law, but there were no attesting witnesses to it. Letters of administration with the will annexed were granted out of the Probate Division of the High Court in England:—

*Held*, that the will was a valid execution of the power.

The question (as stated by Stirling J. in *In re Price* [1900] 1 Ch. 442, 447) is whether the word "will" in the instrument creating such a power means any instrument recognized by the law of England as a will or a will executed in accordance with the law of England; and the former meaning is the right one, whether the power to appoint is general or special.

*D'Huart v. Harkness* (1865) 34 Beav. 324, *In re Price*, supra, and *In re Simpson* [1916] 1 Ch. 502 followed.

The dictum to the contrary in *In re Kirwan's Trusts* (1883) 25 Ch. D. 373, followed in *Hummel v. Hummel* [1898] 1 Ch. 642, disapproved.

*In re D'Este's Settlement Trusts* [1903] 1 Ch. 898 and *In re Scholefield* [1905] 2 Ch. 408 distinguished.

By a settlement dated August 12, 1855, made on the marriage of Henry John Wilkinson and Leonora Caroline, his wife, certain property in England was vested in trustees, to be held by them, after the deaths of H. J. Wilkinson and L. C. Wilkinson, in trust for such of the children of the marriage as they should jointly appoint by deed, "and, in default of such appointment, and so far as any such appointment shall not extend, then as the survivor of them shall by deed . . . , or by will or codicil, from time to time or at any time appoint"; and, in default of appointment, for the children

who, being sons should attain the age of twenty-one years, or, SARGANT J. being daughters, should attain that age or marry under it. There never was any joint appointment, and H. J. Wilkinson died in Italy in 1911. His widow, L. C. Wilkinson, continued to reside in Italy till her death in 1914. Prior to her husband's death he and she had resided together in Italy for about twenty-four years.

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By her will, which was dated August 5, 1913, she expressed the desire that all four of the unmarried children of the marriage "should have equal shares in the money which is left"—naming the items of the settled property subject to the power (which was all personalty or treated as converted into personalty)—"and any other property which I can have the power and the right to dispose of," and an additional 100*l.* was given to the unmarried son. There was evidence that the will was valid according to Italian law, but there were no attesting witnesses to it. Letters of administration with the will annexed were in 1915 granted to one of the sons of the testatrix out of the Principal Registry of the Probate Division of the High Court in England, and the trustees of the settlement took out an originating summons raising the questions (1.) whether the domicile of the testatrix was Italian; (2.) whether her will purported to exercise the power; and (3.) whether the will operated to exercise the power, although executed in such a manner as to be in direct compliance with Italian law only, and not with the provisions of the Wills Act, 1837.

*Cecil Turner*, for the plaintiffs, stated the facts and the questions for decision.

*Owen Thompson*, for the unmarried children claiming to take under the will.

*Devonshire* (*Dighton Pollock* with him), for the married children of the marriage.

SARGANT, J. held on the facts that the domicile of the testatrix was Italian, and that she showed an intention to exercise the power.

*Owen Thompson*. The last question is whether the Italian will is an execution of the power, although it was a special power. It is proved that the will was valid according to the law of Italy, and it

SARGANT J. has been admitted to probate in England, or rather, which is the same in effect, letters of administration with the will annexed have been granted in this country. The will, it is submitted, was a good exercise of the power although it was not attested, and on the face of it it shows an intention to exercise the special power. By s. 9 of the Wills Act, "no will shall be valid unless it shall be . . . signed at the foot or end thereof by the testator . . . and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator." By s. 10, "no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required." And by s. 27, "a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power"; and the section contains a similar enactment as to personal estate. By s. 1 of Lord Kingsdown's Act (24 & 25 Vict. c. 114) every will made out of the United Kingdom by a British subject (whatever may be his domicile at the date of the will or his death) is, as regards personal estate, to be held to be well executed for the purpose of being admitted in England to probate, "if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where" the testator "was domiciled when the same was made." In Dicey's Conflict of Laws, 2nd ed. p. 691, there is the following: "Rule 189.—A will of movables made in exercise of a power of appointment by will conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—(1.) complies with any of the following conditions as to form (that is to say)—. . . (b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile." For this statement there are cited *D'Huart v. Harkness* (1) and *Milnes v.*

*Foden* (1); and reference is made to Rule 184 (p. 667 of the same work) that "any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid."

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In *D'Huart v. Harkness* (2) the property was held in trust for such persons and in such shares as the settlor's daughter should "by her last will and testament in writing duly executed" appoint. The daughter was domiciled in France at her death in March, 1861, and by her will, dated in January, 1861—that is to say, before Lord Kingsdown's Act was passed—she gave the property to her husband. The will was not attested, but was valid according to French law, and had been admitted to probate in England, and Romilly M.R. held that the will was a valid execution of the power. He says: "The English law admits two classes of wills to probate, first, those which follow the forms required by the 1 Vict. c. 26, s. 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. . . . When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will, which, according to the law of this country, is valid, though it does not follow the forms of the statute." In *In re Kirwan's Trusts* (3) the power was to appoint amongst the children of the donee of the power, by deed or will, to be executed in the presence of one or more witness or witnesses. By a codicil the donee purported to appoint, but the codicil, though valid according to French law, was not attested. The codicil was admitted to probate in England under Lord Kingsdown's Act. *D'Huart v. Harkness* (2) was not cited, and Kay J. held that the codicil was not a good execution of the power, holding that the Act only "makes a will executed abroad by a British subject a good will if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the Wills Act, namely, that no testamentary appointment can be made unless it is attested by two witnesses." In *Hummel v. Hummel* (4)

(1) (1890) 59 L. J. (P.) 62.

(3) 25 Ch. D. 373, 381.

(2) 34 Beav. 324, 327.

(4) [1898] 1 Ch. 642.



SARGANT J. *D'Huart v. Harkness* (1) was cited before and distinguished by 1917 Kekewich J., who, following *In re Kirwan's Trusts* (2), held that a will, valid according to French law, but not attested, was not a WILKINSON'S SETTLEMENT, *In re*, BUTLER v. WILKINSON. valid execution of a general power to appoint by will. In *In re Price* (3) Stirling J. held that the will of a domiciled Frenchman, executed in and valid by the law of France, and admitted to probate in England, though not attested, was a valid execution of a power of appointment by will over personal estate under an English settlement. He followed *D'Huart v. Harkness* (1) and did not follow *In re Kirwan's Trusts* (2) or *Hummel v. Hummel* (4); but he stated the question as to the meaning of the word "will" in the instrument creating the power. He says: "The first question arises as to the word 'will' which there occurs—whether it means any instrument recognised by the law of England as a will or a will executed in accordance with the law of England"; and held that the former meaning was the right one. *In re Price* (3) and *D'Huart v. Harkness* (1) are discussed in Dicey's Conflict of Laws, in note 20 in the Appendix, pp. 823, 825, 826, and in the same note, pp. 823—825, *In re Kirwan's Trusts* (2) and *Hummel v. Hummel* (4) are dealt with. In *Barretto v. Young* (5) the will executing the power was to be executed "in the presence of and attested by two or more credible witnesses." Byrne J. held that a will executed by a domiciled Frenchwoman, and admitted to probate in England, but not attested, was not a valid execution of the power. In *In re D'Este's Settlement Trusts* (6) Buckley J. held that where under an English settlement there was a general power to appoint personalty by will the power was not exercised by the will of a domiciled foreigner, valid by the law of her domicile, but not attested, containing a general bequest of personalty, but not using words introducing the statutory rule of construction, as to bequests operating as execution of general powers, contained in s. 27 of the Wills Act; and that case was followed by Kekewich J. in *In re Scholefield*. (7) An appeal from his decision was settled. (8) In *In re Walker* (9) the instrument creating a special power required it to be executed by will or codicil

(1) 34 Beav. 324.

(2) 25 Ch. D. 373.

(3) [1900] 1 Ch. 442, 447.

(4) [1898] 1 Ch. 642.

(5) [1900] 2 Ch. 339.

(6) [1903] 1 Ch. 898.

(7) [1905] 2 Ch. 408.

(8) [1907] 1 Ch. 664.

(9) [1908] 1 Ch. 560.

“signed in the presence of and attested by two or more witnesses.” SARGANT J. The domicile of the donee of the power was in Scotland, the law of which does not require attesting witnesses, and Joyce J. held that an unattested codicil made by her, admitted to confirmation in Scotland and to probate in England, was a good execution of the power, the Court aiding the defective execution. In *In re Simpson* (1) a British subject had died domiciled in France, leaving an unattested will in French by which she gave the usufruct of “all the property and rights whatsoever” comprised in her estate to A. for life, with a gift over on A.’s death of “the ownership” of the property and rights, and wholly cancelled “any testamentary or other dispositions” theretofore made by her. The will was valid by French law and was admitted to probate in England, and Neville J. held that the will effectually exercised a general testamentary power of appointment which the testatrix had over the trust funds of an English settlement. He followed *D’Huart v. Harkness* (2) and dissented from the dictum of Kay J. in *In re Kirwan’s Trusts* (3), followed by Kekewich J. in *Hummel v. Hummel* (4), to the effect that the will of a British subject domiciled abroad, being a valid will by the law of the domicile and admitted to probate in England, must comply with the formalities required by ss. 9 and 10 of the Wills Act in order to exercise a general testamentary power of appointment in an English settlement. [He also referred to Farwell on Powers, 3rd ed. p. 153.]

*Devonshire (Dighton Pollock with him)* for the married children. The will is not a valid execution of the power. In *In re Simpson* (5) Neville J. said: “Both before and since Lord Kingsdown’s Act a will executed abroad in accordance with the law of domicile was entitled to probate in England and capable of executing a power of appointment,” and disapproved of the distinction by Stirling J. in *In re Price* (6) of *In re Kirwan’s Trusts* (3) and *Hummel v. Hummel* (4) from *D’Huart v. Harkness*. (2) *In re Kirwan’s Trusts* (3) has been both followed and distinguished, but it has never been overruled, and it is in my favour.

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(1) [1916] 1 Ch. 502.

(2) 34 Beav. 324.

(3) 25 Ch. D. 373.

(4) [1898] 1 Ch. 642.

(5) [1916] 1 Ch. 509.

(6) [1900] 1 Ch. 442, 447.

SARGANT J. SARGANT J. decided that the will was a valid execution of the power but said that he would later state his reasons for so holding.

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March 16. SARGANT J. In this case I have already expressed my view (1.) that Mrs. Wilkinson was domiciled in Italy for many years prior to her death ; (2.) that her will purported to exercise the power of appointment amongst children vested in her under her marriage settlement ; and (3.) that her will operated to exercise the power, although executed in such a manner as to be in direct compliance with Italian law only and not with the provisions of the Wills Act. I thought, however, in view of the numerous authorities on the last of these points, that as to this point I had better put my reasons into writing.

The question to be solved seems to me to be most clearly and definitely stated at the beginning of the admirable judgment of Stirling J. in *In re Price*. (1) It is whether the word "will" in such a power as occurs in the settlement here includes any instrument recognized by the law of England as a will, or is limited to a will executed in accordance with the law of England. Stirling J. answered this question, as Lord Romilly had previously answered it in *D'Huart v. Harkness* (2), namely, by holding that the word "will" had the wider of the two meanings, and that, consequently, the conditions requisite to the exercise of the power had been complied with when once you found probate in this country of a will of a donee of such a power purporting to exercise the power. Both *D'Huart v. Harkness* (2) and *In re Price* (1) were cases in which the power was a general power, while here the power is a special power. But, in my judgment, this does not alter the nature of the problem to be solved ; and when once English law has recognized a document as a will by admitting it to probate, that document is a will within the meaning of such a power as this, and is therefore capable of exercising the power.

It is true that the decision in *In re Kirwan's Trusts* (3) (where *D'Huart v. Harkness* (2) was not cited) and the case of *Hummel v. Hummel* (4) were to some extent in conflict with *D'Huart v. Harkness*. (2) But *In re Price* (1) seriously weakened the

(1) [1900] 1 Ch. 442.

(2) 34 Beav. 324.

(3) 25 Ch. D. 373.

(4) [1898] 1 Ch. 642.

authority of *In re Kirwan's Trusts* (1) and *Hummel v. Hummel* (2), SARGANT J. and must at least be taken as limiting their operation to cases where the will purporting to exercise the power could only be admitted to English probate under the provisions of Lord Kingsdown's Act.

It is also true that *In re D'Este's Settlement Trusts* (3) and *In re Scholefield* (4) have again cast doubts on the generality of the application of the rule in *D'Huart v. Harkness* (5), and have at least created exceptions from the rule, namely, in a class of cases where there is no indication in the will itself of an intention to exercise the general power, and such exercise would only take place by virtue of the provisions of s. 27 of the Wills Act. But both these cases have been seriously criticized in and much shaken by the recent decision of Neville J. in *In re Simpson* (6), with which I entirely agree, and to the reasoning in which I think the following addition may perhaps be made. Sect. 27 of the Wills Act, though contained in an Act relating to wills, is really an enactment dealing primarily with powers, and property subject to powers, rather than with wills. That section seems to me to recognize that the interest of the donee of a general power of appointment over property is so analogous to ownership of property that a will of that person making a general disposition of property should, *prima facie*, be held to extend to and include property embraced in a general power. And, if this is the true view of the section, I see no reason why the statutory extension of such a disposition should be limited to wills made in accordance with the law of England and should not apply to any will recognized by the law of England as such.

For these reasons I think that the decisions in *D'Huart v. Harkness* (5) and *In re Price* (7) are of more general application than would appear to be indicated by *In re Kirwan's Trusts* (1) or *In re D'Este's Settlement Trusts*. (3) But in any case these last two decisions cannot now be taken as throwing doubt on the general rule, and must at most be regarded merely as establishing two classes of exception to it. And it is sufficient for the present

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(1) 25 Ch. D. 373.

(4) [1905] 2 Ch. 408.

(2) [1898] 1 Ch. 642.

(5) 34 Beav. 324.

(3) [1903] 1 Ch. 898.

(6) [1916] 1 Ch. 502.

(7) [1900] 1 Ch. 442.



SARGANT J. purpose to say that, even if those two classes of exception exist,  
 1917 the present case does not fall within either of them.

WILKINSON'S The property will therefore go amongst the unmarried children  
 SETTLE- after making provision for the 100*l.* legacy to the unmarried son.  
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BUTLER Solicitors: *Iliffe, Henley & Sweet, for Wilkinson & Butler,*  
*v.*  
 WILKINSON. *St. Neots, Hunts; Church, Adams, Prior & Balmer.*

F. E.

ASTBURY J. *In re* NATIONAL LIVE STOCK INSURANCE COMPANY,  
 1917 LIMITED.

*Feb. 27.*

[00169 of 1914.]

*In re* NATIONAL GENERAL INSURANCE COMPANY,  
 LIMITED.

[0015 of 1914.]

*Company—Winding up—Two insolvent Companies—Administration—  
 Cross-Claims—Duty of each Company to satisfy its Indebtedness to  
 the other before sharing in Assets—Liberty for Liquidator to distribute  
 Assets amongst Creditors of each Company other than the Debtor  
 Company.*

Two companies, each of which was now in liquidation, were indebted to one another, one in respect of arrears of calls, the other in respect of balance of account and money lent. According to the evidence, there was no prospect of either company receiving a cash dividend in the liquidation of the other, if it was first bound to satisfy in full the amount of its indebtedness to the other:—

*Held*, that, according to the principle stated in *In re Rhodesia Goldfields* [1910] 1 Ch. 239 and cases there referred to, neither company was entitled to receive a cash dividend in the liquidation of the other without first satisfying in full the amount of its indebtedness to the other, and that under these circumstances liberty should be given to the liquidator in the liquidation of each company to distribute its available assets in payment of dividends to its other creditors without regard to the claim of the debtor company in each case.

THE first of these summonses was taken out by Sir William Peat, as liquidator of the National Live Stock Insurance Company,

Limited (hereinafter referred to as the Live Stock Insurance Company), asking that he might be at liberty to distribute the sum of approximately 4000*l.* in his hands as such liquidator by way of first interim dividend amongst the creditors of the Live Stock Insurance Company other than the respondents, the National General Insurance Company, Limited (hereinafter referred to as the General Insurance Company), without retaining any part of such sum to provide for the proportion of dividend notionally due to the respondents.

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The second summons was taken out by Sir William Peat, as liquidator of the General Insurance Company, asking that he might be authorized, in any distribution of the assets of the General Insurance Company to its creditors by way of dividend, to exclude from participation in any such dividend the claim of the Live Stock Insurance Company until the latter company had "paid" the sum of approximately 31,250*l.* advanced to them by the General Insurance Company.

The General Insurance Company was a shareholder in the Live Stock Insurance Company, and was indebted to the latter company in a sum of 28,325*l.* for arrears of calls. The Live Stock Insurance Company was itself indebted to the General Insurance Company in a sum of 31,250*l.* for balance of accounts and money lent prior to the liquidation of the Live Stock Insurance Company. The Live Stock Insurance Company was now in course of voluntary liquidation, and the General Insurance Company was in course of voluntary liquidation under a supervision order.

According to the evidence of the liquidator the assets and liabilities of each company were such that there was no prospect of more than a few shillings in the pound being paid by way of dividend amongst the creditors of either company, and consequently, if each company was under the obligation of paying in full the amount of its indebtedness to the other, there was under the most hopeful circumstances no prospect of its ever becoming entitled to receive a cash dividend in the liquidation of the other.

*Gore-Browne, K.C.*, and *H. Hurrell*, for the applicant on the first summons. Having regard to the law and facts in evidence, the order asked for by the liquidator should be made. There can be

ASTBURY J. no set-off of a debt against calls owing to a company in liquidation :

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*In re Auriferous Properties* (1) ; and where two companies are in liquidation, and one holds shares in the other and is at the same time a creditor, the creditor company cannot take any dividend until all calls due by it are paid : *In re Auriferous Properties* (No. 2) (2) ; *In re Leeds and Hanley Theatres of Varieties*. (3) Applying these authorities to the present case, it is clear on the evidence that, even under the most hopeful circumstances, the General Insurance Company will never become entitled to receive any payment in cash from the Live Stock Insurance Company, and therefore there can be no reason for retaining any part of the 4000*l.* to provide for any dividend which is only notionally due to the General Insurance Company.

*Maugham, K.C.*, and *R. H. Hodge*, for the respondents to the first summons and for the applicant on the second summons. As regards the first summons, we do not dispute the principle which prevents the General Insurance Company from receiving a cash dividend in the liquidation of the Live Stock Insurance Company until it has paid the arrears of calls owing by it. As regards the second summons, the principle in question is equally applicable to the case of the Live Stock Insurance Company, which cannot receive any cash dividend in the liquidation of the General Insurance Company without first satisfying in full its debt of 31,250*l.* to the Live Stock Insurance Company. The principle does not depend on set-off, but rests on the broad ground that a creditor cannot receive anything out of a common fund without first making good what he owes to that common fund : see per Buckley J. in *In re Leeds and Hanley Theatres of Varieties* (4) and per Swinfen Eady J. in *In re Rhodesia Goldfields* (5), who refers to *Cherry v. Boulton* (6) and *In re Akerman*. (7) The result in the present case therefore appears to be that neither company will ever be entitled to receive any actual dividend in the liquidation of the other, and the liquidator of the General Insurance Company is equally entitled to the order asked for by the second summons.

(1) [1898] 1 Ch. 691.

(2) [1898] 2 Ch. 428.

(3) [1904] 2 Ch. 45.

(4) [1904] 2 Ch. 51.

(5) [1910] 1 Ch. 239.

(6) (1839) 4 My. & Cr. 442, 447.

(7) [1891] 3 Ch. 212, 219.

*Gore-Browne, K.C.*, and *H. Hurrell*, for the respondents to the *ASTBURY J.* second summons, did not argue to the contrary.

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*ASTBURY J.* These are two summonses, one taken out by the liquidator of the Live Stock Insurance Company and the other by the same gentleman, who is also liquidator of the General Insurance Company, for the purpose of obtaining the direction of the Court as to the distribution of the assets of each company.

The matter has arisen by reason of the fact that the Live Stock Insurance Company is indebted in a sum of 31,250*l.* to the General Insurance Company for balance of accounts and money lent, and the General Insurance Company is indebted to the Live Stock Insurance Company in a sum of 28,325*l.* for arrears of calls. The assets of each company are such that there is no substantial prospect of the debt owing to either company being ever paid in full, and it is now proposed that the assets of each company shall be distributed amongst its creditors other than the other debtor company in each case. For instance, the Live Stock Insurance Company is now in a position to distribute a sum of approximately 4000*l.* by way of interim dividend assuming that no dividend is payable to the General Insurance Company. On the other hand, the General Insurance Company will in course of time be in a similar position and be able to distribute an interim dividend provided it is not liable to recognize the claim of the Live Stock Insurance Company until that company has made good its debt.

It is unnecessary to go through the many authorities which exist on the point. They are all summed up by Swinfen Eady J. in *In re Rhodesia Goldfields* (1), where the learned judge says: "The principle is well settled and is not open to question. It is to be found in numerous cases." Then he refers to *In re Akerman* (2), in which Kekewich J. says: "The principle is to be found laid down in *Cherry v. Boulton* (3) in the passage to which I have just referred, and also in *Courtney v. Williams* (4), and no doubt, if search were made, it would be found to have been laid down in many other cases. It is this. A person who owes an estate money, that is to say, who is bound to increase the general mass of the

(1) [1910] 1 Ch. 239, 245.

(3) 4 My. &amp; Cr. 442, 447.

(2) [1891] 3 Ch. 212, 219. •

(4) (1846) 15 L. J. (Ch.) 204.



ASTBURY J. estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back. That is expanding what the Lord Chancellor calls in *Cherry v. Boulton* (1) 'a right to pay out of the fund in hand,' rather than a set-off." Swinfen Eady J. also refers to *In re Goy & Co.* (2), in which Stirling J. says: "It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the same fund." Then Swinfen Eady J. sums up the matter as follows (3): "Various cases on the subject of set-off were referred to in order to shew that an unliquidated demand cannot be set off against a liquidated debt, or a debt not due against one that is due; but this rule is of a much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund." In *In re Leeds and Hanley Theatres of Varieties* (4) Buckley J. dealt with the same subject. That was a case where two companies were in liquidation and one, the Finance Company, was a creditor of the other, the Theatres Company, for 5100*l.* secured by debentures, and was also a debtor to the Theatres Company in a sum of 4323*l.*, and the learned judge said: "The proper administration in my judgment, therefore, is this. Notionally treat the Finance Company as having paid the 4323*l.* to the Theatres Company; take the aggregate notional sum thus arrived at and treat it as applied in payment of a dividend upon all the debts of the Theatres Company—that is to say, upon the 5100*l.* due to the Finance Company and the 4685*l.* due to other people. That will attribute to the Finance Company a certain sum. If that sum be greater than the 4323*l.* that they owe, they will get the difference. If it be less, or equal, they will receive nothing."

(1) 4 My. &amp; Cr. 442, 447.

(2) [1900] 2 Ch. 149, 153.

(3) [1910] 1 Ch. 246.

(4) [1904] 2 Ch. 45, 51.

Applying that rule to the present cases, on the liquidator's evidence it is fairly obvious that neither company will be in a position to receive any cash dividend in the winding up of the other; and that being so, I think the fair order to make in each case is that which is asked for by the liquidator, leaving it for him to put the matter right in the unlikely event of sufficient assets which are not anticipated ultimately falling in. The orders will be in the terms of the summonses, substituting in the case of the second summons the word "satisfied" for the word "paid."

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Solicitors: *Roney & Co.; William A. Crump & Son.*

A. C.

*In re* WINCH'S SETTLEMENT.

WINCH v. WINCH.

[1910 W. 3188.]

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J.

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*Feb.* 8, 16.

*Settlement—Power of Appointment amongst Issue—Power of Advancement—"Expectant presumptive vested or appointed share"—Appointment to Child for Life with defeasible Remainder to Child's Issue—Contingent absolute Interests of Child—Power to advance Child.*

A special power in favour of issue contained in a marriage settlement was exercised in favour of the infant plaintiff, the only child of the marriage, in manner following:—The income of the settled fund, after her father's death, to the plaintiff for life; after her death the capital to her children living on a day named or who should before such day attain twenty-one, or being female marry; but such trust for her children was not to take effect if the plaintiff was living and under fifty-two years of age on the day named, in which event she was to take the whole fund absolutely. Subject as aforesaid, the settled fund was appointed to the plaintiff absolutely; the appointment, however, was not to take effect unless and until the plaintiff attained twenty-one.

There was a power of advancement in the usual form in the settlement to the extent of one half of "the expectant or presumptive or vested share" of any child, or "the appointed share" of any child or grandchild of the marriage. The appointment contained a power of advancement in respect of "the expectant or presumptive or vested share" of any child of the plaintiff, but no provision for her advancement:—

*Held*, reading the appointment into the settlement, that the

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advancement clause in the settlement was only exercisable in favour of the persons who next under the provisions of the settlement were or would be entitled to an expectant, presumptive, or vested share of the corpus, and did not apply to a person who might become entitled to the corpus upon failure of the prior trusts; and that the power of advancement in the settlement was not available for the purpose of providing funds out of capital for the benefit of the plaintiff.

#### ADJOURNED SUMMONS.

By the settlement, dated May 13, 1902, made upon the marriage of the plaintiff's father certain stocks belonging to him, and constituting and called the husband's trust funds, were settled upon trust for the husband for life, and after his decease upon trust for the wife if surviving during her life, and after the death of the survivor upon trust for the children or remoter issue of the marriage as the husband and wife should by deed jointly appoint, and in default of and subject to any such joint appointment as the survivor of the husband and wife should by deed or will appoint, and in default of and subject to any appointment in trust for the children or child of the marriage, sons at twenty-one and daughters at twenty-one or marriage, with an ultimate trust in the event of no child attaining twenty-one, or being female marrying, for the husband absolutely.

The settlement empowered the trustees after the death of the husband and wife to apply the income of the share of the husband's trust funds to which any child should be entitled in expectancy towards his or her maintenance, education, or benefit, and power was also given to the trustees after the death of the husband and wife, or in their, his, or her lifetime with their, his, or her consent in writing, "to raise any part or parts not exceeding in the whole one half of the then expectant or presumptive or vested share of any child of the said intended marriage in the said trust premises under the trusts hereinbefore contained and to pay or apply the same for his or her advancement or otherwise for his or her benefit in such manner as the trustees shall think fit," and it was thereby agreed "that the powers and provisions hereinbefore contained for the advancement and maintenance of the children of the said intended marriage and the accumulations of surplus income shall (unless otherwise provided in and subject to the provisions of the

appointment) apply to any share or shares appointed to any child or grandchild of the said intended marriage under either of the powers hereinbefore contained in that behalf."

The plaintiff, now fourteen years old, was the only child of the marriage.

In 1907 the marriage was dissolved, and by an order of the Chancery Division dated April 14, 1908, the terms of the settlement were varied, enabling the husband to exercise his power of appointment in favour of the children or issue of the marriage over the husband's trust funds as if the wife were dead.

By a further order dated December 18, 1912, a scheme was sanctioned by the Court upon the plaintiff's application providing for the purchase out of capital of her father's life interest in the husband's trust funds, under which scheme, after payment of the premiums on certain policies, there remained a balance of income of about 70*l.* per annum available for the plaintiff's maintenance.

In pursuance of the last-mentioned order the plaintiff's father, in exercise of the power given to him by the settlement as varied by the order of April 14, 1908, by deed poll dated December 19, 1912, appointed that immediately after his death the husband's trust funds should be held upon trust to pay the income thereof to the plaintiff during her life without power of anticipation (limited in duration as therein mentioned), and from and after her death upon trust for all her children living on the day last before that on which should expire the period of twenty-one years from the death of the survivor of her father and mother, or who should before such day attain the age of twenty-one years or being female marry, provided that such trust for her children should not take effect if such day should occur while the plaintiff was alive and under the age of fifty-two years, in which event the whole of the husband's trust fund should be held in trust for the plaintiff absolutely. The appointment provided that the trustees might at any time or times after the death of the plaintiff, or in her lifetime with her consent in writing, raise any part or parts not exceeding in the whole one half of the then expectant or presumptive or vested share of any child of the plaintiff in the husband's trust funds under the trusts thereinbefore contained, and pay or apply the same for his or her advancement, or otherwise for his or her benefit, in such manner

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PETERSON as the trustees should think fit. Subject to the foregoing trusts  
J. and powers the husband's trust funds were appointed to be held  
1917 on trust for the plaintiff; and it was thereby provided that  
WINCH'S the foregoing appointment was not to take effect unless and  
SETTLE- until the plaintiff should attain the age of twenty-one years  
MENT, or marry.  
*In re.*

WINCH  
v.  
WINCH.

This was an application by the plaintiff by the official solicitor, her next friend, for the determination (inter alia) of the question whether the trustees of the settlement had power under the power of advancement therein contained or otherwise to apply any part of the capital of the husband's trust funds for her benefit.

*Underhill*, for the plaintiff. The power of advancement in the settlement extends to an "expectant or presumptive or vested" share. The mere appointment of the share has not taken it out of the settlement and the power remains and applies: *In re Hodgson*. (1) Until the plaintiff comes of age her interest is expectant, i.e. contingent, as contradistinguished from vested. If she lives to attain twenty-one she takes everything absolutely unless she has a child who attains a vested interest, and even then she takes everything if she lives and is under fifty-two before the day named. In other words, she will on attaining twenty-one become entitled to an absolute vested interest in the whole fund subject to its being divested only in the event of her dying before, or being over fifty-two on, the day named and also having a child who lives to attain a vested interest. That is the interest to which she is now entitled in expectancy or presumptively, and I submit that the power of advancement applies. [He also referred to *In re Greenslade*. (2)]

*Stafford Crossman*, for the defendant trustees. "Share" must mean a share of capital, and "advancement" means something out of that share in advance. A beneficiary entitled only to income cannot have a share of capital given to her under such a power as this. The plaintiff has only a remote contingent interest in the capital, and her unborn children are the only persons, if any, who can be advanced. The power cannot be exercised in favour of the plaintiff. If it can, then it will always be possible to advance a remote reversioner to the detriment of infants about to attain a

prior vested interest. That has never been done. [He referred to *Molyneux v. Fletcher*. (1)]

*C. J. W. Farwell* and *Lyttelton Chubb*, for other defendants, took no part in the argument.

*Cur. adv. vult.*

Feb. 16. PETERSON J. The question in this case is whether the trustees have any power to apply capital by way of advancement to or for the benefit of the plaintiff. The settlement made on the marriage of the plaintiff's parents provided as follows: [His Lordship read the material parts of the settlement, and continued:] In 1907 the marriage was dissolved. The plaintiff was the only child of the marriage, and is now fourteen years old.

As the result of a scheme sanctioned by an order of the Court, and dated December 18, 1912, the father's life interest in the funds settled by him was purchased out of capital, and after providing for premiums there is a balance of income of about 70*l.* available for the maintenance of the plaintiff. In pursuance of the order the father appointed the trust funds brought into settlement by him. That appointment must be read into the settlement, and accordingly the husband's trust fund is now held on trust to pay or apply the income, after paying premiums, to or for the benefit of the plaintiff during her father's life and thereafter to pay it to the plaintiff for life. After her death the capital goes to her children who shall be living at the expiration of twenty-one years from the death of the survivor of the plaintiff's father and mother or who shall before that time attain twenty-one, or being female marry, with a proviso that if the plaintiff is living and under fifty-two at the expiration of the period of twenty-one years the capital is to belong to her, with an ultimate limitation in favour of the plaintiff. The appointment also provided for the advancement of a child or children of the plaintiff, but did not make any provision for any advancement for the benefit of the plaintiff.

The question is whether the power of advancement contained in the settlement is still available for the purpose of providing funds out of capital for the benefit of the plaintiff. In my opinion

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—

it is not. The power of advancement assumes that an object of the power in whose favour it may be exercised has an expectant, presumptive, or vested share in the corpus of the trust funds, and it contemplates the case of a child who has such a share subject to her parents' life interests. In the present case the next interest after the determination of her father's life interest is the plaintiff's interest for life. She only becomes entitled to the corpus if she has no children who attain a vested interest, or if she is living and under fifty-two at the expiration of twenty-one years from the death of the survivor of her father and mother. The persons who will prima facie become entitled to the corpus are her children, if she has any.

In my opinion such an advancement clause as this is only exercisable in favour of the persons who next under the provisions of the settlement are or will be entitled to an expectant, presumptive, or vested share of the corpus, and does not apply to the case of a person who may become entitled to the corpus on the failure of the previous trusts of the corpus.

The decision in *In re Hodgson* (1) was cited in support of the contention that the advancement clause could be used for the purpose of providing funds for the benefit of the plaintiff. [His Lordship read the head-note to the report of the case in the *Law Reports* and continued :] That case decided that the advancement clause applied to appointed as well as to unappointed shares. The appointment was an appointment of a share of corpus to a son who then settled it, and the learned judge came to the conclusion that as that appointment was to be treated as part of the settlement the power of advancement applied to it, but he did not hold that under the power of advancement any portion of the fund which had been settled by the son could be paid to him. That was a case in which under the joint effect of the settlement and the appointment the son became entitled, subject to previous life interests, to a share of corpus, and accordingly the power of advancement was applicable. But it certainly did not decide that the power of advancement was operative in favour of a person who had an interest in corpus, more or less remote, contingent on the failure of prior interests in corpus.

(1) [1913] 1 Ch. 34.

The answer, therefore, to this question in the summons is in the negative.

Solicitors : *The Official Solicitor ; Fowler & Co.*

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CONDHAN *v.* STARK.

(LIVERPOOL DISTRICT REGISTRY.)

[1913 C. 1314.]

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1917  
March 24 ;  
April 3.

*Excess Profits Duty—Sale of Business—Purchase-money payable by Instalments—“ One third of the nett profits ” of each Year—Deduction—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), Part II., s. 35 ; Part III.*

An agreement made in April, 1914, for the sale of a business provided that part of the consideration should be paid by “ one equal third part of the nett profits ” of the business in the year ending September 30, 1914, and in each succeeding year up to March 31, 1919.

*Held*, that “ nett profits ” meant the profits of the year's trading which were divisible among the persons interested, and that consequently, as excess profits duty must be deducted before the profits which were divisible could be ascertained, the vendors were only entitled to one third part of the profits after excess profits duty had been deducted.

*Collins v. Sedgwick*, ante, p. 179, followed.

*William Hollins & Co. v. Paget*, ante, p. 187, and *Thomas v. Hamlyn & Co.* [1917] 1 K. B. 527 ; 33 Times L. R. 129 distinguished.

THIS was a summons in an action for the administration of the trusts of the above-named testator's will in which his infant children were the plaintiffs.

In that action the Court had sanctioned an agreement dated April 18, 1914, for the sale of the testator's business of a ship scaler to the defendants, the trustees of the will. Clause 5 of that agreement provided that part of the consideration for the sale should be the sum of 3456*l.* 19*s.* 8*d.*, payable on or before December 31, 1915, with interest in the meantime at 5 per cent., and that as the residue



PETERSON of the consideration for the sale the purchasers should pay to the  
 J. general banking account of the testator's estate "one equal third  
 1917 part of the nett profits of the business" in the year ending Sep-  
 CONDRAN, tember 30, 1914, and in each succeeding year up to September 30,  
*In re.* 1918, and in the half-year ending March 31, 1919. Clause 6 pro-  
 CONDRAN vided that, for the purpose of ascertaining the amount of the nett  
 v. profits, the profit and loss account should be debited with the interest  
 STARK. on the sum of 3456*l.* 19*s.* 8*d.* so long as it remained unpaid, a salary  
 of 200*l.* per annum for each of the purchasers, interest at 5 per cent.  
 on the purchasers' capital, and a sum of 750*l.* per annum to be  
 carried to a special reserve fund to answer claims under the Work-  
 men's Compensation Acts.

Questions having arisen relating to the deduction of excess profits  
 duty, this summons was taken out by the plaintiffs for a declaration  
 that the amount payable by the defendants for excess profits duty  
 in respect of the business of ship scalers carried on by them for any  
 financial year ought not to be deducted from the profits of the  
 business before ascertaining the one equal third part of the nett  
 profits of the business payable to the testator's estate pursuant to  
 the agreement; and for an order for payment into the general  
 banking account of the testator's estate one third of the sums  
 deducted in respect of the duty for the year ended September 30,  
 1915, and provisionally retained in respect of the duty for the  
 year ended September 30, 1915.

It had been already decided in the action that no part of the  
 income tax payable in respect of the profits of the business was to  
 be deducted from the share of profits payable to the testator's estate,  
 but that the same was to be paid by the defendants personally.

*Hughes, K.C.*, and *Courthope Wilson*, for the plaintiffs. The sum  
 certified as being the nett profits for each year is the sum which  
 has to be divided into thirds, and no deduction should be made  
 for excess profits duty.

Instalments of purchase-money which represent capital are not  
 income or liable to income tax: *Secretary of State in Council of*  
*India v. Scoble* (1); *East Indian Ry. Co. v. Secretary of State in*  
*Council of India*. (2) These payments are to be "one equal third

(1) [1903] A. C. 299.

(2) [1905] 2 K. B. 413.

part of the nett profits " of the business, and are not annuities or annual payments, but are instalments of purchase-money. *Johnston v. Chestergate Hat Manufacturing Co.* (1) shows that in ascertaining the nett profits available for dividends income tax must not be deducted, and we submit that the same principle applies in this case in respect of excess profits duty, and that for this purpose income tax and excess profits duty stand on the same footing: *William Hollins & Co. v. Paget* (2), which decision is clearly in point. *Collins v. Sedgwick* (3) turned on the phrase "the entire profits available for distribution as dividend." Clause 6 of the agreement shows specifically what, and what only, are to be the deductions before nett profits are ascertained, and only those items have priority. Subject to those items, the instalments of purchase-money, as between the plaintiffs and defendants, come next as a charge on the nett profits and in priority to any income tax or excess profits duty. [Sect. 38, sub-s. 1; s. 40, sub-s. 1; s. 45, sub-ss. 1, 2, and 3; and clauses 1, 2, 3, and 4 of Part I., Sched. IV., of the Finance (No. 2) Act, 1915, were also referred to.]

*Tomlin, K.C.*, and *Rutherford*, for the defendants. The defendants are entitled to bring into account as an outgoing and to deduct excess profits duty for the purpose of ascertaining the "one equal third part of the nett profits" of the business. Having regard to the provisions of the Act and of this agreement and to the decision in *Collins v. Sedgwick* (3), their right to deduct this duty would be beyond doubt but for the decision in *William Hollins & Co. v. Paget* (2), which rested on the construction of a very special agreement. The whole principle of that decision was that, because something was taken from a man which was his, excess profits duty was on the same footing as income tax. But income tax is a tax imposed and charged upon or payable by the "persons bodies politic or corporate," &c., receiving the profits (s. 100, Sched. D, Income Tax Act, 1842)—through the machinery provided by s. 54 of that Act. Excess profits duty is altogether different. It is charged on and payable by a fund (s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915) as distinguished from a person, and by s. 40, sub-s. 1, that fund is to be separately determined. It does not

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(1) [1915] 2 Ch. 338.

(2) Ante, p. 187.

(3) Ante, p. 179.

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follow that returns of profits for the purposes of income tax and excess profits duty will be the same for the same period. Sect. 40 and Part I., Sched. IV., of the Finance (No. 2) Act, 1915, give another standard for the determination of profits and accentuate the difference between the duty and income tax.

Nett profits cannot be ascertained until excess profits duty has been deducted, because the duty is a charge upon the profits, and is an outgoing which has to be paid to the Government for the licence to carry on the business. Sect. 35, sub-s. 1, shows that it is an outgoing of the business for the purpose of arriving at the artificial sum which is to measure liability for income tax. We submit that *Collins v. Sedgwick* (1) is indistinguishable in principle and covers this case.

*Hughes, K.C.*, in reply. The nett profits of a business are the profits before deducting income tax or excess profits duty : *William Hollins & Co. v. Paget*. (2) The profits available for distribution as dividend are the profits after deducting excess profits duty : *Collins v. Sedgwick*. (1) The two cases are thus distinguishable, and the former applies to this case.

[PETERSON J. referred to *Thomas v. Hamlyn & Co.* (3)]

*Cur. adv. vult.*

April 3. PETERSON J. The question in this case is whether under an agreement of April 18, 1914, excess profits duty ought to be deducted in order to ascertain the nett profits of the business now carried on by the defendants, Messrs. Stark and Carew, one equal third part of which is payable by them for a term of years into the banking account of the testator's estate. Under this agreement Messrs. Stark & Carew, who are the executors of the testator's will, became the purchasers of the testator's business. The consideration was a sum of 3456*l.* 19*s.* 8*d.* payable on or before December 31, 1915, with interest at 5 per cent. in the meantime, and one equal third part of the nett profits of the business in each year up to March 31, 1919. The agreement provided that for the purpose of ascertaining the amount of the nett profits the profit and loss account should be

(1) Ante, p. 179.

(2) Ante, p. 187.

(3) 33 Times L. R. 129 ; [1917] 1 K. B. 527.

debited with interest on the sum of 3456*l.* 19*s.* 8*d.* so long as it was unpaid, a salary of 200*l.* per annum for each of the purchasers, interest at 5 per cent. on the purchasers' capital, and a sum of 750*l.* per annum which was to be carried to a special reserve fund to answer claims under the Workmen's Compensation Acts. This is a special provision which enables the particular sums referred to to be debited to profit and loss account, but does not, of course, prevent the purchasers from debiting to profit and loss account any sums which can properly be debited to that account.

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*In re.*  
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—

The question is whether excess profits duty is to be treated as an outgoing of the business for the purpose of this agreement or whether the testator's estate is entitled to receive one third part of the entire profits without any deduction of the amount payable by the purchasers as excess profits duty. The plaintiffs' contention is that excess profits duty is a share of the nett profits, and that both the duty and the one third share of the nett profits to which the testator's estate is entitled are charges on the same fund, with the result that the former cannot be debited for the purpose of ascertaining the latter.

There are three cases in which questions of a similar character to the present have been considered. In *William Hollins & Co. v. Paget* (1) Eve J. held that under an agreement which provided that when the profits of a company were more than sufficient to pay the preference dividend and a dividend of 7 per cent. on the ordinary shares the manager should be paid a commission of 5 per cent. on the excess, the excess profits duty ought not to be deducted before ascertaining the amount on which the commission was payable. In *Thomas v. Hamlyn & Co.* (2) Rowlatt J. held that where a manager of certain branches of a company's business was entitled to a percentage of the nett profits of those branches which were to be ascertained by deducting all expenses of those branches, the company could not deduct from the nett profits of the branches the proportion of the excess profits duty which might, if it were apportioned, have been attributable to those branches. In *Collins v. Sedgwick* (3) I held that under the articles of association of a company which provided that the selling price of the shares should

(1) *Ante*, p. 187.

(2) 33 Times L. R. 129; [1917] 1 K. B. 527.

(3) *Ante*, p. 179.



PETERSON be regulated by the amount of the entire profits available for distribution as dividend, allowance must be made for excess profits duty in ascertaining what were the profits available for distribution as dividend.

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In each of the first two cases the learned judge who decided it considered that excess profits duty was a contribution to the Exchequer of part of the company's profits and was analogous to income tax, which admittedly could not be deducted for the purpose of ascertaining nett profits. I feel a natural diffidence in criticizing the views of learned judges who have had far greater experience than I have enjoyed ; but I cannot help thinking that, while there may in one sense be some resemblance between income tax and excess profits duty, inasmuch as both are assessed, although on a different basis, with reference to profits, there are also marked differences between them. Income tax is ultimately payable by the person who is entitled to receive the profits. A company pays income tax on behalf of the shareholder and the income tax payable on his dividend is treated as part of his dividend, so that if he is in fact entitled to exemption he can recover the amount of the tax from the Revenue authorities. So too, in the case of partners, while a firm normally makes the returns and pays the tax a partner may claim exemption and be separately assessed (s. 168 of the Income Tax Act, 1842, Sched. D, Rule 3, "Duty on trade carried on by two or more persons—How to be charged"). It is, of course, impossible to treat such a duty as an outgoing of the business. Excess profits duty on the other hand is assessed on the person owning or carrying on the business and is recoverable as a debt from him (s. 45 of the Finance (No. 2) Act, 1915), and is payable in respect of the profits of the business, and not in respect of the benefit which a shareholder or partner derives from the business ; and it is impossible for any shareholder or partner to claim a return of any portion of the duty on the ground that his total income is such as to entitle him to exemption ; for the tax is a duty on the amount of the aggregate excess profits earned by the business. Nor are excess profits duty and income tax payable in respect of the same fund ; for excess profits duty is for the purpose of income tax treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable (s. 35 of the Finance (No. 2) Act,

1915). It is no doubt true that both taxes are payable in respect of profits, but they are not payable in respect of the same profits, and it seems to me impossible, if income tax is payable in respect of nett profits, to say that excess profits duty is also payable in respect of nett profits, inasmuch as the former is payable in respect of a sum which is ascertained after deducting the latter. In my view excess profits duty is, under ss. 38 and 45 of the Finance (No. 2) Act, 1915, a debt due to the Crown, the amount being ascertained with reference to the amount by which the profits exceed the pre-war standard.

Now, if it is an annual debt, is there anything which prevents it from being deducted before nett profits can be ascertained under such an agreement as the present? The answer to that question appears to depend upon the meaning of the words "nett profits." As I understand the words, they signify the excess of receipts over current expenses and outgoings of a business, the fund which in any year is capable of being applied to the payment of a dividend or capable of being divided between partners as the fruit of the year's operations. In a partnership agreement which provided that the nett profits should be divided equally between the parties excess profits duty would be debited before the profits which were divisible could be ascertained; and in my view this agreement stands on a similar footing. The true view of clause 5 is, I think, that when the profits which represent the fruit of the year's industry are ascertained one third is to belong to the testator's estate, while the remaining two thirds are to belong to the two partners who carry on the business. But if the fund which represents nett profits is to be divided into three equal parts of which one is to belong to A. and two to belong to B. and C., excess profits duty must be deducted before the fund is divided; for if it is thrown, as between the parties interested, on the two third parts which are to belong to B. and C., they would not enjoy two equal third parts of the profits.

In my opinion "nett profits" in such an agreement as the present means the profits of the year's trading which are divisible among the persons interested; and consequently, as excess profits duty must be deducted before the profits which are divisible can be ascertained, I am of opinion that the testator's estate is only entitled

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PETERSON to one third of the profits after excess profits duty has been deducted.

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CONDRAN  
v.  
STARK.

I desire to say that the comments which I have ventured to make on some of the observations of the learned judges who decided *Thomas v. Hamlyn & Co.* (1) and *William Hollins & Co. v. Paget* (2) do not involve the view that the decisions in those cases were not correct. They were decisions on the interpretation of different agreements, and in the former case, where the question was what were the nett profits of some out of many branches of a business, it is difficult to see how excess profits duty, which is only assessable in respect of the profits of the business as a whole, could be deducted for the purpose of ascertaining the nett profits of one or more of the branches.

Solicitors: *H. J. Sharman, Liverpool; Barrell & Co., Liverpool.*

R. M.

EVE J. HOPKINSON v. MORTIMER, HARLEY & CO., LIMITED.

1917

[1916 H. 1200.]

*Feb. 23;*  
*March 6.*

*Limited Company—Alteration of Articles—Special Resolution—Validity—Fully-paid Shares—Lien on Shares—Forfeiture for Debts—Ultra Vires—Illegal Reduction of Capital—Clog on Equity of Redemption.*

Article 22 of the articles of association of a limited company, as altered by a special resolution, provided that the company should have a first and paramount lien upon all the shares registered in the name of each member for the debts, liabilities, and engagements of such member. Article 23 provided that the board might sell the shares for the purpose of enforcing the lien, and might also by a resolution to that effect, forfeit the shares subject to such lien.

The holder of fully-paid shares brought an action against the company and its directors asking for a declaration, in effect, that his fully-paid shares were not subject to the power of forfeiture for debts on the ground that it was ultra vires and illegal. There had been no threat to forfeit the plaintiff's shares:—

*Held:* (1.) That the plaintiff was not premature in coming to

(1) 33 Times L. R. 129; [1917] 1 K. B. 527.

(2) Ante, p. 189.

the Court, as his rights had already been invaded and his property damaged.

(2.) That under this power the forfeiture for debts due from a member generally, as distinct from those due from him as a contributory, would amount to an illegal reduction of capital.

(3.) That the lien being an equitable charge in the nature of a mortgage, the power to forfeit the plaintiff's shares, on his failure to redeem on a seven days' notice, was a clog on the equity of redemption and as such invalid and ultra vires and the plaintiff was therefore entitled to the declaration claimed.

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& Co.,  
LIMITED.

THE plaintiff, Cyril Oswald John Hopkinson, sued on behalf of himself and all other shareholders of the defendant company (except the defendants).

The defendants were the defendant company and the four directors. The defendant company was incorporated on March 22, 1912, with a capital of 100,000*l.*, divided into 9900 preferred ordinary shares of 10*l.* each, conferring the right of non-cumulative preferential dividend of 10 per cent. per annum, and 1000 deferred ordinary shares of 1*l.* All the deferred shares and 8445 of the preferred shares had been issued, and (with the exception of seven preferred shares) had been fully paid up. The plaintiff had been a former manager of the company, and was the present holder of 100 fully-paid deferred shares. The company had claims against him. The board of directors issued a notice dated June 9, 1916, for an extraordinary general meeting for the 17th of that month, when a resolution was to be submitted as an extraordinary resolution, and subsequently on July 6, 1916, they issued another notice convening a confirmatory meeting for July 15, 1916. The first part of the proposed resolution was that the articles of association of the company be altered: (1.) By striking out from article 22 the words "other than fully-paid shares." The effect of this alteration would be to create in favour of the company a first lien on fully-paid shares and the dividends thereon for the debts, liabilities, and engagements of the holder of the shares, and to render such shares and dividends liable to forfeiture.

The articles of association as originally framed provided:—

Article 22: "The Company shall have a first and paramount lien upon all the shares, other than fully-paid shares, registered in the name of each member (whether solely or jointly with others) for the debts, liabilities, and engagements of such member, solely



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or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not. And such lien shall extend to all dividends from time to time declared in respect of such shares."

Article 23: "The board may, for the purpose of enforcing such lien, sell the shares subject thereto in such manner as they think fit. The board may also, by a resolution to that effect, forfeit the shares subject to such lien. No sale or forfeiture shall be made under this article until the period of the payment, fulfilment, or discharge of such debts, liabilities, or engagements as aforesaid shall have arrived, nor until notice in writing of the intention to sell or forfeit shall have been served on such member, his executors, or administrators, by posting the same to his registered address, and default shall have been made by him, or them, in the payment, fulfilment, or discharge of such debts, liabilities, or engagements for seven days after such notice."

Article 24: "In the case of a sale the net proceeds shall be applied in or towards satisfaction of the said debts, liabilities, or engagements, and the residue (if any) paid to such member, his executors, administrators, or assigns."

Article 25: "In case of a forfeiture, the forfeiture shall include all dividends declared in respect of the forfeited shares and not actually paid before the forfeiture."

Article 29: "Any share forfeited under any of the provisions of these presents shall be deemed to be the property of the company, and the board may sell, re-allot, re-issue and otherwise dispose of the same in such manner as they think fit."

By a letter of June 13, 1916, the plaintiff requested the directors to abandon this first part of the resolution, and on their refusal to comply the plaintiff on June 16, 1916, issued his writ and served it on the company. The directors nevertheless held the meeting summoned for June 17, 1916, when the resolution was proposed and carried by the required majority. A motion by the plaintiff to restrain the company from proceeding with the confirmatory resolution came on for hearing on July 7, 1916; no order was made thereon, but directions for an early trial were given.

On July 15, 1916, the confirmatory meeting was held and the resolution was carried. At the annual general meeting held on

June 17, 1916, a dividend at the rate of 100 per cent. was declared on the deferred shares of the company, but the directors refused to pay this dividend on the plaintiff's 100 deferred shares.

The plaintiff claimed a declaration that the resolution that article 22 should be altered by striking out the words "other than fully-paid shares" was ultra vires and illegal, or, alternatively, that the resolution, so far as it might have the effect of rendering fully-paid shares of the company liable to forfeiture, was ultra vires and illegal.

The defence to the action was to the effect that the resolution was valid and had been duly confirmed.

*Maugham, K.C.*, and *B. J. Leverson*, for the plaintiff. We submit that this power to forfeit shares for non-payment of debts due to the company is in the nature of a clog upon the equity of redemption and is clearly bad. The plaintiff is unable to deal with his shares although there has been no judgment against him: *Allen v. Gold Reefs of West Africa*. (1) That case shows that a limited company can alter its articles by imposing a lien upon fully paid up shares for non-payment of calls, but it leaves the present point untouched. No power such as that contended for here of forfeiture for debts generally appears in *Palmer's Company Precedents*, 11th ed., part i., pp. 658—664. The company's lien constitutes an equitable charge upon the shares: *Everitt v. Automatic Weighing Machine Co.* (2); and if the company can forfeit the shares at any time under the lien a clog on the equity of the shareholder would be created: *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co.* (3)

A second objection to the lien is that it amounts to a reduction of capital without the sanction of the Court, and enables the company to traffic in its own shares. They may forfeit shares for a debt and then reissue them: *Bellerby v. Rowland and Marwood's Steamship Co.* (4) The Master of the Rolls there says that a limited company cannot purchase its own shares unless by way of reduction of capital with the sanction of the Court, and he refers to *Trevor v. Whitworth* (5) as an authority for that statement. [They also referred

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(1) [1900] 1 Ch. 656.

(3) [1914] A. C. 25

(2) [1892] 3 Ch. 506.

(4) [1902] 2 Ch. 14, 22.

(5) (1887) 12 App. Cas. 409.

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*Gore-Browne, K.C.*, and *F. Whinney*, for the defendants. The action is premature, as the defendants have never threatened to forfeit the plaintiff's shares, nor have they any intention of doing so. The Court cannot interpret the articles before the question has arisen. This is in the nature of a *quia timet* action. The power of forfeiture of shares for non-payment of calls has been long ago established by the cases of *Sparks v. Liverpool Waterworks Proprietors* (2), *Clarke and Chapman v. Hart* (3), and *Stubbs v. Lister*. (4) After the Companies Act, 1862, was passed forfeiture of shares was established for non-payment of calls, or for debts owing to a company. There is no reason why the policy of the law should be against the forfeiture of fully-paid shares as distinct from other shares.

As to the argument that it effects a clog on the equity, that is not the view which the Court takes. It is not the ordinary case of a mortgage. It is more like the position of a partner who has become indebted to the partnership concern and cannot withdraw without paying his debt. At any rate, the right of forfeiture exists and ought to stand, though the Court may relieve against it in equity. Each case as it arises must be decided on its own merits.

*Maugham, K.C.*, in reply. The cases relied on by the defendants are distinguishable. The right of forfeiture of shares is an exceptional one and should not be extended.

*Cur. adv. vult.*

March 6. EVE J. Events which have occurred since the delivery of the statement of claim in this action modify to some extent the relief which the plaintiff claims at the trial, but, substantially, he seeks to have it declared that the fully paid up shares of which he is the holder are not subject to a power of forfeiture which the company was threatening to assume when the action was commenced, and which it has in fact assumed *pendente lite*. Counsel at the Bar disclaims any intention on the part of the company of exercising the power, but has argued that there are no grounds for making

(1) (1882) 21 Ch. D. 583.

(3) (1858) 6 H. L. C. 633.

(2) (1807) 13 Ves. 428.

(4) (1841) 1 Y. & C. Ch. 81, 94.

a declaration to the effect that the power is not in fact exercisable. The point at issue is therefore reduced to this: Aye or no, is the power *intra vires* of the company? The power is to be found in article 23, but in order to appreciate its operation it is necessary to read and consider articles 22, 24, 25, and 29. As these articles were originally framed they had no application to fully-paid shares, and it was the summoning of a meeting to pass a resolution intended to extend their operation to fully-paid shares that led to the institution of this action. The alteration has been effected since the action was launched, and the articles I have mentioned now extend to all classes of the company's shares. [His Lordship read article 22 as altered by the special resolution, and articles 23, 24, 25, and 29, and continued:] There are other articles expressly providing in the usual manner for forfeiture for non-payment of any call or instalment on or before the day appointed for payment, but no question arises here as to this power of forfeiture. The power to which objection is raised by the plaintiff is that conferred by the articles with which I have dealt at length. They obviously provoke several criticisms. Is the power exercisable whatever be the relation of the debt in amount to the market value of the shares? Is the exercise of the power intended to reduce or extinguish the debt, and, if so, what method is to be adopted for determining the value of the forfeited shares? If the value exceeds the amount of the debt, is the company to appropriate for itself, or account to the member for, the excess? Finally, if the value of the shares is not to be credited against the debt, how is the company to deal in its capital account with the amount paid up on the shares?

On grounds suggested by these criticisms, and on the further ground that the power of forfeiture is in the nature of a clog on the equity of redemption subsisting in respect of the shares subjected to the lien, counsel for the plaintiff has argued that the power is obviously *ultra vires*. If it is exercisable without reference to the relative amount of the debt and the value of the shares, or if, notwithstanding the forfeiture, the member still remains liable for the debt, then he says it is a penalty against which the Court will relieve the member. If, on the other hand, the market value of the forfeited shares is set off against the debt, then, in substance, the transaction is a trafficking by the company in its own shares operating

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to bring about, by a simple resolution of the board, a reduction of the company's capital. And, above all, he insists that the member whose shares are subjected to the lien is in the position of a mortgagor and that the company as mortgagee cannot fetter his right to redeem by reserving to itself an option to take the mortgaged property if it is not in fact redeemed.

To these arguments it is answered on behalf of the company, first, that inasmuch as there is not any threat, or indeed any present intention, to forfeit the plaintiff's shares, his action is premature, and that he ought to be left to apply for such relief as this Court will give him if and when the company is seeking or threatening to exercise the power as a penalty; secondly, that the power of forfeiture has long been recognized as a legitimate power exercisable by a joint-stock company without resulting in any breach of the restrictions on capital reduction, and that in the case of fully paid up shares it does no injury to creditors or contributories; and, thirdly, that the position of a member whose shares are subjected to a lien is not that of a man who has charged his property by way of security, but rather that of one who has agreed inter socios not to withdraw his property from the common stock without discharging any debt he may owe to the corporate body.

I will deal with each of these arguments in turn, and first as to the action being premature. The plaintiff is the holder of 100 fully paid up shares in the company on which a dividend at the rate of 100 per cent. was recently declared; this dividend is retained by the company. What is the plaintiff's position as the holder of those shares? The answer is supplied by a quotation from the judgment of the Master of the Rolls in the recent case of *In re Bede Steam Shipping Co.* (1) He answers the question thus: "He has a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles." This being so, how can it be said that he is premature in coming to the Court as soon as the company notifies its intention of imposing on his property a liability calculated to depreciate its saleable or marketable value? In my opinion there is nothing in this suggested answer to the plaintiff's claim. Although the writ was issued before the alteration of the articles was accomplished,

(1) Ante, pp. 123, 132.

the plaintiff's proceeding is really not in the nature of a quia timet action; his case is that his rights have already been invaded and his property damaged, and he claims, as it seems to me he is entitled to claim, that the present is the time for redress. Whether he can succeed in proving he is entitled to relief is quite another matter, but I cannot hold that he is precipitate in asking for it.

I pass on to the question whether forfeiture under this power would or would not result in an illegal reduction of capital. It is true that the assumption and exercise of a power of forfeiture by a joint-stock company has long been recognized as reasonable, and indeed in some circumstances as almost necessary, and that the reduction brought about by the exercise of such a power is not inconsistent with the implied statutory prohibition against the reduction of capital. It is to be presumed, as contended for by Mr. Gore-Browne, that the Legislature, in framing s. 26 of the Act of 1862 and articles 17 to 22 of Table A, had in mind the decisions in such cases as *Sparks v. Liverpool Waterworks Proprietors* (1) and *Clarke and Chapman v. Hart* (2), and appreciated that a right of forfeiture for non-payment of calls and contributions had long been recognized as the only effective way of preventing co-adventurers from making default in performing their engagements; but I do not think it follows from anything to be found in the Act or in any reported case that the reduction of capital brought about by means of a forfeiture for non-payment of debts due from a member generally, as distinct from debts due from him as a contributory, is legalized without being sanctioned by the Court.

Even if the forfeiture is made without any part of the value of the shares being set off against the debt, the capital is reduced by the amount paid up on the forfeited shares, and if on the other hand the debt is partially or wholly satisfied the transaction involves not only the same reduction, but what is equivalent to an actual payment by the company; and how can this operation be said to be anything but a purchase by the company of its own shares? I think, further, when one appreciates the narrow limits within which the Court has decided that a surrender of shares may properly

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(1) 13 Ves. 428.

(2) 6 H. L. C. 633.

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be regarded as not infringing the principles established by *Trevor v. Whitworth* (1) (see in particular the judgment of Cozens-Hardy L.J. in *Bellerby v. Rowland & Marwood's Steamship Co.* (2) and *Rowell v. John Rowell & Sons, Ltd.* (3)), it is impossible to believe that a power to forfeit vested in the board, and bringing about, if exercised, one or both of the consequences I have just indicated, ought to be held valid. This is not even a case in which the exercise of the power is vested in the company. It is a matter to be determined by a resolution of the board, and is not therefore primarily within the purview of the Act of 1867, though possibly it might be brought so by the company passing the necessary special resolution for giving effect to the proposed reduction. But, as the article stands, I am of opinion it is invalid in this respect, and that the board cannot forfeit shares for non-payment of the debts and liabilities therein referred to without bringing about an illegal reduction of the company's capital in any event and a purchase by the company of its own shares in some events. It may be that a reduction in capital brought about by the forfeiture of fully-paid shares inflicts no injury on the creditors or contributories, but this consideration cannot legalize a procedure which for other reasons is illegal, and it does not exist if in fact the value of the shares—which may be greatly in excess of the amount paid up on them—has to be brought into account with the defaulting member.

I think the third point relied upon by the defendant company is concluded by authority. In *Everitt v. Automatic Weighing Machine Co.* (4) North J., following *In re General Exchange Bank* (5), treated the company's lien as constituting an equitable charge upon the shares for the debts due from the shareholder to the company, and held the lien to be a mortgage and the shareholder a mortgagor within the meaning of the Conveyancing Act; and in *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co.* (6) Lord Parker pointed out in his speech that a condition in a mortgage transaction providing that if the contractual right to redeem was not exercised the mortgaged property was thereafter to belong to the mortgagee was in the nature of a penalty against which equity

(1) 12 App. Cas. 409.

(2) [1902] 2 Ch. 14.

(3) [1912] 2 Ch. 609.

(4) [1892] 3 Ch. 506.

(5) (1871) L. R. 6 Ch. 818.

(6) [1914] A. C. 25, 49.

would relieve and was a clog on the equity in the proper sense of the expression. EVE J.

Such being the state of the law, I think this power to forfeit the plaintiff's shares on his failure to redeem on a seven days' notice is a clog on the equity and as such invalid and ultra vires.

It remains for me to observe on two cases which have been cited during the arguments; one is *In re Dunlop*. (1) What that case decided was that the provisions of a deed of settlement executed in 1843, by which the banking company therein mentioned was governed, did not create a lien or charge on the shares of a customer for a debt due from him to the bank, and that even if such lien or charge had been created it would have been a general lien, and certain real estate specifically charged as security for the debt would have had to be exhausted before any recourse could be had to the shares. I am not saying that a power to forfeit a contributory's shares for non-payment of debts generally is an invalid power to be inserted in the articles of a company registered under the Companies Acts, but *In re Dunlop* (1) is no authority for saying it is a valid one. The other case is *Stubbs v. Lister*. (2) In that case Knight Bruce V.-C. treated a clause giving the directors an option to sell or forfeit for non-payment of any debts due to the company which was contained in the deed of settlement of the Liverpool Union Bank as binding on a member indebted to the bank for cash advances, but he only did so by holding that the bank, if it elected to take to the shares and not to sell them, was bound to take them at their true value and apply that value in reduction of the debt. He expressly rejected the construction which would have made the forfeiture effect an extinguishment of the debt, on the ground that such a construction might lead to shares worth 5000*l.* being forfeited for a debt of 5*l.*, and he particularly pointed out that the shares, being a security, could not be taken at par, or otherwise than at their true value. This case certainly supports the view that here also the company, if it exercises the power, must account to the shareholder for the real value of the forfeited shares, but if this be the correct view the conclusion is almost inevitable that the transaction is nothing else than a purchase by the company of its own shares.

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In my opinion, the plaintiff is right in his contentions, and I think he is entitled to a declaration that the fully-paid shares of which he is the holder are not subject to the power of forfeiture contained in article 23. The defendant company must pay the costs.

Solicitors : *Atkey, Clarke & Atkey ; Wansey, Stammers & Co.*

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FOWLER v. MIDLAND ELECTRIC CORPORATION FOR  
 POWER DISTRIBUTION, LIMITED.

[1916 F. 635.]

*Company—Debentures—Payment off—No Place fixed for Payment—  
 Death of Debenture-holder—Executor—Delay in Registration of  
 Probate—No Legal Tender—Interest until Date of Payment—  
 Liability of Company.*

Where the registered debenture of a company does not contain any provision appointing a particular place for payment, it is the duty of the company to seek the debenture-holder, if he is within the realm, and make legal tender of the money on the due date without request ; and in a case where no such legal tender has been made the holder of such a debenture, who from oversight, carelessness, or other cause has neglected to present his debenture for payment off on the due date, can recover from the company interest on the principal moneys thereby secured down to the date of actual payment.

Decision of Eve J., ante, p. 527, affirmed.

APPEAL by the defendants from a decision of Eve J. (1)

The facts are fully stated in the report of the case in the Court below and sufficiently appear from the judgment of the Master of the Rolls.

*Maugham, K.C.*, and *R. W. Baxter*, for the appellants, repeated the arguments used by them in the Court below, and referred to the following additional authority : *Newton v. Metropolitan Ry. Co.* (2)

*Clayton, K.C.*, and *Frank L. Wright*, for the respondent, were not called upon to argue.

(1) Ante, p. 527.

(2) (1861) 1 Dr. & Sm. 583.

LORD COZENS-HARDY M.R. This seems to me to be a very plain case. A certain Miss Fowler was entitled to eighteen debentures for 100*l.* each carrying a specified rate of interest, the principal sum with a premium being made repayable on June 30, 1913. The debentures were also secured by a charge upon the property of the company created by a deed which is referred to in the conditions indorsed on the debentures. We have not anything to do with that charge here. This is simply an action on the debentures themselves claiming the 1800*l.* principal money which became due on June 30, 1913. It was not then paid, and it is said that it carries interest until payment and that it ought to be paid to the plaintiff, who is the legal personal representative of Miss Fowler.

Now Miss Fowler is said to be, and I assume she was, a trustee of these debentures for a certain charity. That makes no difference, however, because when we look at the debentures themselves it is quite clear, as is stated in condition 11, that "In the event of the death of the registered holder . . . of any debenture his executors or administrators . . . shall be the only person or persons recognised by the company as having any title to such debenture." It is entirely immaterial, therefore, whether Miss Fowler was beneficially interested in the 1800*l.*, or whether she was, as in truth apparently she was, merely a trustee for the charity; the money was payable to her representatives, and not to any new trustees the charity might select. Miss Fowler was the registered holder of these debentures, her name was on the register, and interest warrants were from time to time paid by the company by cheque through her bankers. There is an express provision in the conditions that interest may be paid by cheque. The particular cheque for the interest warrant for the half-year ending June 30, 1913, was returned through the bankers with the information that the lady was dead, and the bank gave the information which they then had that one of the executors was a Mr. Challiner, and apparently when he was applied to he said "It is true I am one of the executors named, but I have renounced," and he gave the name of the other executor who did prove.

Nothing more happened; no communication whatever was made by the company to the executor who ultimately did prove except with reference to the interest warrant which had been

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returned by the bankers. No mention was made to him of the 1800*l.* and interest which was due to the lady's executors. Of course, if this had been her own money and part of her residuary estate, her executor, George William Fowler, the present plaintiff, would in the ordinary course, I presume, have dealt with it, and this question would not have arisen. The securities were put by Mr. Fowler into his deed box, which was deposited by him with the Chancery Lane Deposit Company and forgotten there, and they did not turn up until much later.

In June, 1916, this action was commenced. The defendants paid into Court the 1800*l.* and the premium, together with the interest earned up to the date of such payment in. The plaintiff contends that he has a legal right under the express covenant made by the company with Miss Fowler, his testatrix, to the full interest at 4½ per cent. until repayment of the 1800*l.* with the premium.

We are invited to hold there is something special and peculiar in the debentures of the company which prevents the ordinary law applicable to debtor and creditor from applying to this case. I entirely refuse to assent to that view. Whether the money is secured by debenture or by bond, which was a mode very commonly adopted fifty or a hundred years ago, is quite unimportant—there is an obligation under seal by the company to repay on June 30, 1913, a certain sum of 1800*l.* with a premium and with interest. The interest runs until repayment is made, unless it can be shown that a tender has been made which has not been accepted, or that there has been some default or breach of an obligation on the part of the plaintiff which stops the interest running. I can see no trace of such a thing here. The debentures do not name any place where the principal sum is to be repaid. There is no condition providing for the repayment of the principal sum by cheque as there is in the case of the payment of interest. I think it would be dangerous in the last degree to listen for a moment to the suggestion which has been made that there is some company law in the City, when transactions of this kind are entered into, which makes it improper that the company should be chargeable with interest up to the date when the full repayment of the capital sum is made.

I do not myself think that there is any obligation whatever upon the executor to register. I cannot find anything in the conditions

to require that. I think if the executor goes to the company and says "My testatrix is the registered owner of these debentures; here they are; here is the probate of her will. I am the sole executor. Please pay me the amount due under these debentures," that is perfectly good and there is not the least necessity for any kind of registration at all.

I agree entirely with the judgment of Eve J. I think the defence to this action is misconceived, and the appeal must be dismissed with costs.

BANKES L.J. I am of the same opinion. I quite agree with what fell from the learned judge in the Court below with reference to the construction of these debentures, and I really should not have said anything except for the argument of Mr. Maugham. He suggests that as a consequence of our decision the position of secretaries of companies will be a pitiable one, and that their whole duty, or a great part of it, will consist of rushing about the country seeking out the creditors of their respective companies; and he has appealed to what he says is "the universal practice of mankind" to induce us to accept his view of the construction of these debentures. If there is a universal practice of mankind, and if it is applicable to this case at all, I should say that it would lead one to the conclusion that the occasions are rare when a creditor does not demand and, if necessary, present himself promptly to receive, payment of money which is due to him; and in those rare cases where he does not do so either from carelessness or neglect or ignorance, then the rights of the parties have to be decided according to the strict letter of their bargain. And the bargain, as I understand it, contained in these debentures was that on a given date the company would repay the principal and would pay interest until the principal was repaid.

If there was any evidence whatever that the creditor had prevented, in the ordinary sense of the word, payment to him by the company by absconding or deliberately absenting himself, or keeping himself out of the way or deceiving the company as to his whereabouts, there might be foundation for some of the observations that were addressed to us. But in this case it is plain what the position was. This lady died, and one of the named

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executors renounced probate ; but by October 25, 1913, the company received information from Mr. Fowler that he expected probate would be obtained within the next three weeks, the caveats which had been entered against probate having been withdrawn, and he requested the company to send the cheque for interest due down to June 30, 1913, to a certain bank. The company on October 27, 1913, having information, therefore, as to who the executor was and that probate would be obtained within the next three weeks, wrote back and said that until probate had been registered they had no authority to pay. By "registered" there they merely meant that the fact that probate had been obtained had been noted in their books. That may be a convenient practice to adopt, but the company cannot insist upon any such registration as a condition precedent to their liability to repay.

That being the position of things in 1913, the company themselves did nothing. They knew who the creditor was. It was open to them to write a letter to him and say "We insist upon having the probate registered. When are you going to send it in, because please remember you are entitled to this principal?" They did nothing for three years until 1916; and then when it is found that the executor has forgotten what the position was, he having put these debentures away, they turn round and say "You have prevented us from paying." As far as I can see, there is not the slightest ground for supporting that contention.

WARRINGTON L.J. I am of the same opinion. The case is an extremely simple one. By documents which are called debentures, but which are for the present purpose to my mind ordinary covenants to pay, the defendant company covenant to pay Miss Mary Jane Fowler, as the registered holder, the principal sum of 1800*l.* with a certain premium on June 30, 1913, together with interest at 4½ per cent. per annum. June 30, 1913, arrives. Miss Fowler then happens to be dead; her will is not proved until some months later, and for reasons which are quite immaterial probate of the will was not produced to the company and noted in their books until April, 1916. The company then refused to pay the stipulated interest on the 1800*l.* from June 30, 1913, and the present action is brought to enforce the covenant to pay.

What possible answer can there be ? The registered holder has done nothing to prevent the company from paying the debt. The obligation, if you look at the terms of the covenant in the debentures themselves and the conditions indorsed on them, is to pay the registered holder, or in case the registered holder is dead then his executors or administrators. There is an executor and the company have not paid. Their only answer is that there is something peculiar about the contract between them and the debenture-holder which renders it incumbent on the Court to hold that the ordinary common law rule as to the duty of the debtor to find out his creditor and pay him is not to apply. I altogether repudiate any such suggestion. The covenant is an ordinary covenant to pay, and, unless it contains some special provisions in terms excluding the common law obligation as between debtor and creditor, I do not think the Court ought to recognize any such exclusion or to countenance the idea for a moment that there should be such an exclusion of the common law right.

This is an ordinary action on a covenant to pay. Payment has not been made, and the plaintiff is plainly entitled to judgment.

LORD COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool ; Ranger, Burton & Frost, for George Trenam, Balham.*

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1917, will be as follows:—

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